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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. —

HON. RICHARD H. ICHORD, ET AL., PETITIONERS

v.

JEREMIAH STAMLER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the defendant members of the House of Representatives who are members of the House Committee on Internal Security, the Attorney General and the United States Attorney for the Northern District of Illinois, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case insofar as it reverses the dismissal of respondents' complaints and directs certain further action in the district court.

OPINIONS BELOW

Neither the opinion of the court of appeals (App. A, *infra*) nor that of the district court (App. C) is yet reported. Previous decisions in this case by this Court and the courts below (Apps. D, E, F, G) are reported at 393 U.S. 407, 393 U.S. 217, 287 F. Supp. 734, 371 F. 2d 413; the memorandum of decision set forth in Appendix H is unreported.

JURISDICTION

The judgment of the court of appeals (App. B) was entered on August 5, 1969. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether respondents, persons formerly subpenaed by the House Committee on Un-American Activities and now under indictment for contempt for their refusal to answer questions directed to them by that Committee, have stated a justiciable and sufficiently concrete claim in challenging all future operations of that Committee's successor, the House Committee on Internal Security.

2. Whether the respondents have alleged circumstances sufficient to justify injunctive relief against trial of the pending contempt indictments.[1]

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[1] Circuit Judge Cummings, who wrote the opinion for the court of appeals, also sat as a member of the three judge district court (improperly convened) which previously rendered a decision in this case. There may thus be a question, which the government has not previously raised but this Court could notice, whether his participation on appeal was consistent with the provision of 28 U.S.C. 47 that "no judge shall hear or determine an appeal from the decision of a case or issue tried by him." *See Wm. Cramp Sons* v. *Curtis Turbine Co.*, 228 U.S. 645; *Moran* v. *Dillingham*, 174 U.S. 153. If not, the remedy in this Court would be to vacate the judgment and remand for the appeal to be reheard. *Ibid.* Since this Court has ruled, however, that the case was not properly before the three-judge district court, 393 U.S. 217, 407, it could be contended that he had not "tried" the case or issue within the statutory contemplation.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Article I, Section 5, Clause 2 of the United States Constitution provides in part:

> Each House may determine the Rules of its Proceedings * * *.

Article I, Section 6, Clause 1 of the United States Constitution provides in part:

> * * * and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Rule XI, Section 18, of the Rules of the House of Representatives in the 89th Congress (111 Cong. Rec. 21, 25, adopting by reference the Legislative Reorganization Act of 1946, as amended, 60 Stat. 823, 828) provided in relevant part:

> (b) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character and objects of Un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle or the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

Rule XI, Section 11 of the Rules of the House of Representatives in the 91st Congress (115 Cong. Rec. H 958, 980) provides in relevant part:

(b) The Committee on Internal Security, acting as a whole or by subcommittee, is authorized to make investigations from time to time of (1) the extent, character, objectives, and activities within the United States of organizations or groups, whether of foreign or domestic origin, their members, agents, and affiliates, which seek to establish, or assist in the establishment of, a totalitarian dictatorship within the United States, or to overthrow or alter, or assist in the overthrow or alteration of, the form of government of the United States or of any State thereof, by force, violence, treachery, espionage, sabotage, insurrection, or any unlawful means, (2) the extent, character, objectives, and activities within the United States of organizations or groups, their members, agents, and affiliates, which incite or employ acts of force, violence, terrorism, or any unlawful means, to obstruct or oppose the lawful authority of the Government of the United States in the execution of any law or policy affecting the internal security of the United States, and (3) all other questions, including the administration and execution of any law of the United States, or any portion of law, relating to the foregoing that would aid the Congress or any committee of the House in any necessary remedial legislation.

STATEMENT

On March 18, 1965, the House Committee on Un-American Activities resolved to hold hearings in Chicago, Illinois, concerning the organization and operation of the Communist Party in that area.[2] In-

[2] "Be it resolved, That hearings be held by the Committee on Un-American activities or a subcommittee thereof, at such times

accordance with Rule XIV of the Committee's Rules of Procedure (Revised 1961), the then Chairman, Edwin E. Willis, appointed a subcommittee of five

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and places as the Chairman may determine, and that the staff be authorized to conduct investigations deemed reasonably necessary in preparation therefor, relating to:

"1. As concerns the Chicago, Illinois area and the Illinois District of the Communist Party of the United States; the structure and organization of the Communist Party of the United States; its major objectives, and the strategical and tactical methods designed to aid in accomplishing such objectives; the major areas of Communist Party concentration; organizations created and controlled by the Communist Party to advance the policies and objectives of the Communist movement; Communist propaganda activities conducted in support of such objectives; and conspiratorial activities in aid of, or in association with, foreign Communist governments; and also like information regarding other Communist organizations in the Chicago, Illinois area, for the following legislative purposes:

"(a) to provide factual information to aid the Congress in the proposal of any necessary remedial legislation in fulfillment of the directions contained in the mandate to the Committee by House Rsolution 8, of January 4, 1965, and Public Law 601 of the 79th Congress;

"(b) to assist the Congress in appraising the execution by the administrative agencies concerned of Title I of the Internal Security Act of 1950;

"(c) to provide factual information to aid the House in the disposition of presently pending and proposed legislation, including, but not limited to, H.R. 4293, a bill to amend the Subversive Activities Control Act of 1950 so as to authorize the Federal Government to bar from access to defense facilities individuals who may engage in sabotage, espionage, or other subversive acts;

"(d) consideration of the advisability of amending the Internal Security Act so as to impose certain disabilities, in the manner and form therein provided, upon those persons 'affiliated with' Communist organizations as well as upon persons who are members thereof.

"Be it further resolved, That the hearings may include any other matter within the jurisdiction of the Committee which it,

members with himself as chairman to conduct the hearings (Hearings, p. 329). Respondents[3] were subpoenaed to appear before the Committee in Chicago on May 25, 1965. Respondents Stamler and Hall then filed suit, alleging that Rule XI of the Rules of the House of Representatives, the underlying authority for the Committee's investigations, violated the First and Fifth Amendments and that the Committee had subpoenaed them "for the purpose of embarrassing, harassing and intimidating [them] and to deter [them] from the exercise of their rights, privileges and immunities as citizens of the United States, and in particular their rights to freedom of belief, speech, press, assembly and association guaranteed by the First Amendment" (App. 1, pp. 5–12).[4] They requested the convening of a three-judge district court; that the Committee be enjoined from operating in any manner under Rule XI; that the coming hearing be declared "illegal and void"; and that the subpoenas served on them be quashed (App. 1, pp. 12–14). Respondent Cohen filed a petition for leave to intervene as a plaintiff on the same day and it was granted without objection (App. 1, pp. 38–39).

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or any subcommittee thereof, appointed to conduct these hearings, may designate."

Exhibit 50 to the complaint (hereafter "Hearings"), p. 326.

[3] The respondents are the two original plaintiffs Jeremiah Stamler and Yolanda F. Hall and intervening plaintiff Milton M. Cohen.

[4] "App. 1" refers to Appellants' Appendix in Nos. 15268, 15269 in the Seventh Circuit, earlier appeals from the initial dismissal of the suit. "App. 2" refers to Appellants' Consolidated Appendix in Nos. 15268, 15269, 15668 and 15669 in the Seventh Circuit, earlier appeals from a dismissal of the amended complaint.

At the conclusion of a hearing on a motion for a temporary restraining order and for the convening of a three-judge district court, the judge ruled orally that the challenge to the constitutionality of Rule XI was foreclosed by *Barenblatt* v. *United States,* 360 U. S. 109, and that no substantial federal question warranting a three-judge court was presented. He directed that the complaint be dismissed (App. 1, pp. 43–52), and the respondents appealed to the court of appeals.

The plaintiffs appeared for the Committee's sessions, and were called, among other witnesses, to testify. Their request for an executive session was denied (Hearings, pp. 538–542). After each was sworn and gave his name and address, he was asked to state the date and place of his birth; each then refused, on the advice of counsel, to cooperate with the Committee or to give any further testimony while the litigation challenging the Committee's power to proceed was pending (as it then was in the court of appeals). Each left the hearing room at this juncture (Hearings, pp. 547–552), without awaiting the questions which their amended complaint alleges would have been defamatory.

After denial of a motion to have the appeals remanded to the district court for the purpose of supplementing the complaint (App. 1, p. 112), respondents instituted two new actions with expanded allegations. In addition to the relief which had been sought in the first complaint, respondents asked for an injunction against the institution of contempt proceedings arising out of plaintiffs' appearances (com-

pare App. 1, pp. 12–14, with App. 2, pp. 46–47). A three-judge district court was again requested and denied. The complaint was dismissed in a memorandum decision (App. H, *infra*, p. 67) holding that insofar as the complaint sought an injunction against contempt proceedings it was premature and improperly failed to include the United States as a party; if plaintiffs were entitled to relief they could obtain it when and if the Speaker of the House of Representatives certified their contempt for prosecution under 2 U.S.C. 192. As for the challenge to the constitutionality of Rule XI, the judge held that the plaintiffs were in no immediate danger of future interrogation by the Committee and that, consequently, they had no more standing to bring the suit at that juncture than did any bystander.

On a consolidated appeal from the orders dismissing the two actions, the court of appeals vacated the judgment of dismissal and held that the district judge had "exceeded the single-judge preliminary inquiry jurisdiction" of 28 U.S.C. 2282 and 2284 (App. G, *infra*, p. 63). Noting that the complaint alleged that Rule XI had been construed by the Committee to permit "the exposure of witnesses, including plaintiffs, to public scorn and obloquy and harassment and intimidation of these witnesses without any legislative purpose but rather to chill and deter them and others in the exercise of their first amendment rights," a majority of the court concluded that the suit raised "a substantial constitutional question not foreclosed by the Supreme Court in *Barenblatt* v. *United States*, 360 U.S. 109," and thus warranted the convening of a three-judge court.

In the subsequent proceedings before the three-judge district court, respondents were permitted to add the Attorney General and the United States Attorney for the Northern District of Illinois as defendants, in order to assure them the possibility of effective relief on their prayer for an injunction against the then pending prosecutions.[5] Answers to the complaints were filed in December 1967 and January 1968; they asserted the official nature of the acts done and reiterated comprehensive challenges to the jurisdiction of the court and the justiciability of the issues presented that had been raised previously in unsuccessful motions to dismiss. Respondent then moved for production of documents (numerous Committee records) and served a first set of interrogatories and subpoenas to take depositions of members of the staff of the Committee. Petitioners opposed the interrogatories and motion for production of documents and moved for summary judgment.

In March, 1968, the court entered an order requiring the Committee to answer interrogatories and produce records covering a ten-year period, without ruling on the motion for summary judgment. The congressional petitioners then moved, *inter alia,* to stay all discovery against them and to dismiss the consolidated suit against them by reason of their

[5] H. Res. 1060, 1061 and 1062, 89th Cong., 2d Sess. (1966), 112 Cong. Rec. 27439, 27486, 27500, 27641, directed the Speaker of the House to certify respondents' conduct to the United States Attorney for the Northern District of Illinois; the matters were presented to a Chicago grand jury and indictments were returned; trials on these indictments are now pending.

immunity under Article I, Sec. 6, Cl. 1, of the United States Constitution; this motion was supported by a "Claim of Privilege and Exemption from Suit" from each of the nine congressional defendants (5 R. 87–89). On June 26, 1968, the court gave summary judgment for the congressional petitioners on their claim of privilege and dismissed the action as to the prosecutorial petitioners as "ancillary" (App. F, *infra*, p. 43).

Respondents appealed to this Court, which dismissed the appeal, *per curiam*, on November 25, 1968 (App. D, *infra*, p. 41).[6] On January 20, 1969, this Court denied a petition for rehearing, but, amending its earlier order, vacated the decree of June 26, 1968 and remanded the case to the district court for entry of a fresh decree to permit the filing of a timely appeal to the court of appeals (App. E, *infra*, p. 42). Pursuant to this mandate, the three-judge district court dissolved itself and, on January 31, 1969, District Judge Hoffman entered a "Fresh Decree" dismissing the claims against the congressional defendants as barred by the Speech and Debate Clause of the Constitution and the claims against the Attorney General and the United States Attorney as ancillary to the barred claims (App. C, *infra*, p. 32).

On respondents' appeal from this dismissal of the action, the United States Court of Appeals for the Seventh Circuit affirmed as to the congressional defendants, but reversed as to the other defendants (App. A, *infra*, p. 21). It held that the Attorney General and United States Attorney are liable to suit as

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[6] Nos. 478 and 479, October Term, 1968.

officials "following orders given to [them] by the legislature"; that the action for declaratory and injunctive relief is necessary for a prompt and certain determination whether the Committee's charter is overbroad or chills the exercise of First Amendment rights; that the plaintiffs should not be required to save their contentions for assertion as defenses upon trial of the criminal case, where some of the issues might never be reached and less "suitable" discovery would be available; and that the involvement of a coordinate branch of government did not detract from these conclusions. It remanded the case for trial on the merits after full discovery, with specific instructions to permit respondents to add committee employees as additional party defendants as substitutes for the members of Congress who would no longer be defendants personally. While noting that the Un-American Activities Committee ceased to exist at the end of the 90th Congress, the court contemplated that the action would continue without hindrance against its successor in the 91st Congress, the present House Internal Security Committee (whose charter under revised Rule XI differs substantially from that of the former Committee), the only difference being that the nominal defendants would be the new Committee's staff rather than the old Committee's members.[7] And the validity of Rule XI "should be measured against the Committee's conduct over the years" (App. A, p. 27, *infra*).

[7] Since the reconstitution of the Committee in the new Congress occurred while the case was on appeal, the respondents

In allowing the respondents to pursue their claims for declaratory and injunctive relief both against their pending contempt prosecutions and against all future operations of the House Internal Security Committee under revised Rule XI, the court of appeals necessarily held that the respondents have a judicially cognizable interest in the Committee's activities broader than simply protecting themselves against the consequences of the predecessor Un-American Activities Committee's investigation of them as individuals. It is plain from the opinion below that the court contemplates that the Committee should now in effect be on trial for its life in a sweeping proceeding involving discovery into activities by its predecessor in years gone by that in no way involved the plaintiffs, and looking toward a remedy unrelated to any identifiable concrete interest that the plaintiffs now have.[8] We

have not yet sought to amend their complaints to take account of it. We assume, however, that the respondents would do so if the case were returned to the district court as contemplated in the court of appeals' decision, and that they would also accept the court's invitation to substitute the Committee's staff for its members. We do not accept the court's view that the new Rule XI differs only formally from the old Rule XI, and we reserve the right to argue that the change has rendered the attack upon the Committee's future operations moot.

[8] The court of appeals refused to remit respondents to the defense of their criminal case in part for the extraordinary reason that the constitutional questions might not have to be reached

submit that such a claim for future relief against the Committee's activities unavoidably implicates non-justiciable political questions and that the case it presents is intolerably abstract. The respondents' attack upon their pending prosecutions involving past activities by the predecessor Committee is supported by no allegations of any unusual threat to them that cannot fully and fairly be met by way of defense to those prosecutions. Accordingly, we believe that in both respects the court below has seriously overstepped the boundaries of permissible judicial action.

The questions raised by this case with respect to the Committee's future operations relate closely to the issues in several cases decided by this Court last Term—*Powell* v. *McCormack,* 395 U.S. 486; *Golden* v. *Zwickler,* 394 U.S. 103; and *Jenkins* v. *McKeithen,* 395 U.S. 411. But this case involves the interplay of the principles of those cases in a new context, a context of great immediate importance since the trial that is now to begin would be a broad inquest into past congressional activity that may eventuate in a broad proscription of future congressional activity in general terms, and inevitably will interfere to a substantial ex-

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to decide the criminal case in their favor and in part because "more suitable discovery procedures and more liberal rules of evidence are available in the civil action to throw light" on those questions. App. A, p. 26, *infra.*

tent with present congressional activity. And the decision below conflicts with the principles established by this Court relating to injunctive relief against criminal prosecutions.

1. In *Powell* v. *McCormack, supra,* this Court recognized that a case would be non-justiciable as involving a political question if there was a "textually demonstrable constitutional commitment of the issue to a coordinate political department * * * or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government * * *." 395 U.S. at 518. This, unlike *Powell,* is such a case.

The relief sought against future Committee activity under Rule XI is, basically, a determination that the House may not empower one of its committees to operate under such a rule. But the Constitution expressly commits to each House of the Congress, not the courts, the authority to "determine the Rules of its Proceedings," Art. I, Section 5, Clause 2. Pursuant to this express constitutional authority, Congress has established a committee to conduct investigations for legislative purposes into areas that are—as this Court has previously recognized—of obviously legitimate legislative concern.[9] The basic charter of a congressional committee—what is attacked in this case—is necessarily committed to the discretion of Congress, and such a charter, like the Constitution itself or a

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[9] *Watkins* v. *United States*, 354 U.S. 178, 209; *Barenblatt* v. *United States*, 360 U.S. 109, 116–117; *Wilkinson* v. *United States*, 365 U.S. 399, 407–408. Compare *Powell, supra*, 395 U.S. at 520–521 and n. 42.

corporate charter, is necessarily copious in its terms. To expect that a charter should be so detailed and far-seeing as to prohibit any illegal action is to make unreasonable demands upon the draftsmen. To assume that a congressional committee will conduct its future affairs in an improper way is plainly to express a lack of confidence in both those members of Congress who as the Chairman and members of the Committee will direct its affairs and more generally the entire House that will supervise the Committee's activities. There is no claim in this case that the charter of the House Internal Security Committee is inconsistent with the proper conduct of particular investigations; if particular investigations under that charter in fact intrude into improper areas or follow improper procedures, then the courts can, as they have in the past, fashion adequate remedies that do not trespass upon the legislative autonomy of Congress.

In the *Powell* case this Court found no political barrier to adjudication of the specific and narrow question whether the plaintiff was entitled to back pay allegedly accrued during a past Congress, 395 U.S. at 496; in adjudicating that question, it held that Article I, Section 5 of the Constitution clearly provides "that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution" and thus on its face entitled the plaintiff to the relief he sought. 395 U.S. at 550. Accordingly, the case involved the application of a specific constitutional limitation to finite past

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events, far less of an instrusion upon Congressional prerogatives than would attend the declaration sought in this case that a broad area of legislative investigation is foreclosed to Congress because of a judicial prediction that such investigation will chill the exercise of First Amendment rights.

Moreover, refusal to adjudicate the sweeping claims of the complaint here is not an avoidance of the constitutional responsibility of the courts to decide controversies, see 395 U.S. at 549; the respondents' grievances against the predecessor Committee's action involving them can properly be considered in the pending criminal proceedings, and there is no reason to predict that they or any other individual will be unable to find a judicial forum in which to contest any specific future Committee action that may aggrieve them.

There is now neither pending nor contemplated any Committee hearing at which the respondents will be required to appear, and they have alleged no other direct threat to which any future Committee action is likely to subject them. Accordingly, even if it were otherwise justiciable, the respondents' case against future Committee action is, like the claims involved in *Golden* v. *Zwickler,* 394 U.S. 103, 109, 110, intolerably abstract, lacking a "specific live grievance" of "sufficient immediacy and reality" to warrant relief. In *Zwickler,* this Court reiterated (394 U.S. at 110) that

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial author-

ity for their protection against actual interference. A hypothetical threat is not enough.

There is no reason for present judicial interference with the trial of the pending indictments against respondents; for present purposes it is enough to point out that there is no reason to believe that they face any actual threat other than those indictments arising out of past Committee action. Accordingly, as in *Zwickler*, there is no sufficient likelihood of any further controversy arising between the parties.

The present case differs critically from *Jenkins* v. *McKeithen*, 395 U.S. 411, where the prevailing opinion found sufficient concreteness and immediacy in the allegations that the Louisiana Labor-Management Commission of Inquiry (an executive agency having as its purpose "to supplement the activities of the State's law enforcement agencies in one narrowly defined area," 395 U.S. at 417) had "singled out complainant and members of [his local union] * * * for repressive and willfully punitive action * * *." *Id.* at 419. The petitioner there alleged "a concerted attempt publicly to brand him a criminal without a trial" and "that he has been unsuccessful in his attempts to secure prosecution of the charges against him." *Id.* at 425. Nor is there any other case of which we are aware in which a claim for declaratory or injunctive relief has been entertained in circumstances so abstract and remote from any factual threat as those presented here.[10]

[10] Thus, *Bond* v. *Floyd*, 385 U.S. 116, concerned a continuing dispute over plaintiff's right to a seat in the State Legislature; *Dombrowski* v. *Pfister*, 380 U.S. 479, involved an active threat of continued enforcement of the challenged statute. In *Evers* v. *Dwyer*, 358 U.S. 202, plaintiff was threatened with arrest and

2. The court of appeals' decision allowing the pending prosecutions to be attacked impermissibly extends the limited exceptions to "[t]he general rule * * * that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional." *Speilman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 95; *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163–164; *Dombrowski* v. *Pfister*, 380 U.S. 479, 484–485.[11] These cases recognize an exception only for situations where "a showing of danger of irreparable injury

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told that his color required him to sit in the rear of a bus; the record showed that the bus company and municipal officials intended to continue actively to enforce the State statute requiring such segregation until its constitutionality had finally been adjudicated. In *Beacon Theatres* v. *Westover*, 359 U.S. 500, plaintiff had been directly threatened with treble-damage actions under the Antitrust Laws, and suffered continuing impairment of its business.

The present case conflicts directly with *Pauling* v. *Eastland*, 288 F. 2d 126 (C.A.D.C.), where the court declined, as inconsistent with the separation of powers and excessively abstract, both an injunction against enforcement of an outstanding subpoena of a Senate committee and declaratory relief adjudicating the committee's authority to issue the subpoena. And see *Krebs* v. *Ashbrook*, Civ. No. 2157–66 (D.D.C.), decided April 1, 1969, and *Young and Davis* v. *Willis*, Civ. Nos. 2441–68 and 2455–68 (D.D.C.), decided June 26, 1969, to the same effect.

[11] In *Dombrowski*, this Court was concerned with federal interference in a State prosecution, and to that extent its decision accommodated considerations of federalism absent in the present case. It has been assumed, however, that the decision is equally applicable to injunctions sought against federal criminal prosecutions. *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519 (C.A.D.C.). There is, if anything, less reason to interfere where, as here, trial and appeal will be in courts particularly well acquainted with enforcement of federal rights; there is no reason to adopt a more permissive standard for injunctive relief.

'both great and immediate' " is made. 319 U.S. at 164. Whatever may have occurred in the past, here there is no great and immediate danger of irreparable injury to respondents' and others' First Amendment or other constitutional rights from the Committee's continued operations. For the reasons shown above, respondents' case entirely lacks the personal concreteness which has characterized the allegations in the previous cases where courts have found "a situation in which defense of the * * * criminal prosecution will not assure adequate vindication of constitutional rights." *Dombrowski, supra,* 380 U.S. at 485.[12]

Moreover, unlike the previous cases, the rule here challenged as vague does not directly govern respondents' actions, and thus can establish no rules of conduct as to which there might be misapprehension.[13] Rather,

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[12] Thus, in *Dombrowski* there was an active threat of repeated arrests, seizures, and prosecutions of appellants under the challenged statute; in *Terrace* v. *Thompson*, 263 U.S. 197, there was a serious cloud imposed on plaintiff's property rights by the threat of prosecution; in *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519 (C.A.D.C.), plaintiff feared a multiplicity of prosecutions in distant venues as a result of his distribution of allegedly obscene matter through the mails; multiplicity of prosecutions, and the high penalties entailed, were also decisive in *Ex parte Young*, 209 U.S. 123; see also *United States* v. *Wood*, 295 F. 2d 772 (C.A. 5).

[13] Possibly for this reason, this Court's cases have never applied the vagueness doctrine to Rule XI as such. Rather, there has been consistent recognition that the necessarily broad terms of the Committee's mandate can be modified in any particular case by Committee adherence to fair procedures, and challenges to contempt prosecutions brought on the Committee's behalf have been decided on the basis of whether or not there was such adherence in the particular case. See *Watkins*, *Barenblatt*, and *Wilkinson*, *supra.*

it simply enables the Committee to carry on its legislative business, which does not demonstrably and concretely threaten respondents at this time. In such circumstances, use of the limited power to enjoin the conduct of a criminal prosecution is unjustified; no substantial impairment of respondents' rights can be expected if they are remitted to their defense of the pending criminal charges, whereas even the trial of this civil action can be expected substantially to interfere with the work of a congressional committee, whatever the trial's ultimate outcome might be.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1969.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

September Term, 1968—April Session 1969

Nos. 17406, 17407

August 5, 1969

JEREMIAH STAMLER, M.D., and YOLANDA F. HALL, PLAINTIFFS-APPELLANTS, and MILTON M. COHEN, INTERVENING PLAINTIFF-APPELLANT,

v.

HON. EDWIN E. WILLIS, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Before SWYGERT and CUMMINGS, Circuit Judges, and ESCHBACH, District Judge.[1]

CUMMINGS, *Circuit Judge.* This appeal results from a decree dismissing actions against certain members of Congress, the Attorney General of the United States and the United States Attorney for the Northern District of Illinois, challenging the constitutionality of Rule XI of the House of Representatives establishing the charter of the House Un-American Activities Committee, and seeking appropriate relief.

The three plaintiffs were subpoenaed to appear before a subcommittee of said Committee in Chicago on May 25, 1965. On May 24, plaintiffs instituted their

[1] Judge Eschbach is sitting by designation from the United States District Court for the Northern District of Indiana.

first action against the chairman and members of the Committee seeking a declaratory judgment that Rule XI was unconstitutional and an injunction restraining the enforcement of the Rule and the holding of the scheduled hearings. On the same day, the district court, relying on *Barenblatt* v. *United States,* 360 U.S. 109, dismissed the complaint.

Following the May 25–27 Chicago hearings of the subcommittee, plaintiffs commenced a second action, alleging misconduct on the part of the Committee and again seeking declaratory and injunctive relief. This suit was also dismissed by the district court. Both dismissal orders were reversed and remanded by this Court with directions that a 3-judge court be convened to consider the complaints. *Stamler* v. *Willis,* 371 F. 2d 413. After a 3-judge court was designated, the plaintiffs were indicted for contempt of Congress in violation of 2 U.S.C. § 192, growing out of occurrences at the May 25–27 hearings, the cases were consolidated for trial, and the pleadings were supplemented to include a prayer for an injunction against the prosecution of the criminal actions.

Subsequently the 3-judge court granted summary judgment for the Congressional defendants on the ground that the Speech or Debate Clause contained in Article I, Section 6, Clause 1 of the Constitution[2] afforded a complete legal defense to the actions. *Stamler* v. *Willis,* 287 F. Supp. 734 (N.D. Ill. 1968).[3] The dissenting opinion concluded that the Speech or Debate Clause was no bar to the maintenance of this

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[2] The Speech or Debate Clause provides "the Senators and Representatives * * * for any Speech or Debate in either House * * * shall not be questioned in any other Place."

[3] In printing the majority opinion, page 10 was inadvertently omitted from the last paragraph thereof on p. 739.

declaratory or injunctive action (287 F. Supp. at pp. 739–744). The plaintiffs' appeals to the Supreme Court were first dismissed (393 U.S. 217) and then remanded to the (single-judge) district court for the entry of a fresh decree (393 U.S. 407).[4]

Upon remand, the district judge entered another decree resembling the earlier one (reported in 287 F. Supp. 734) but dismissing the complaints under the Speech or Debate Clause instead of granting summary judgment for the defendants. We hold that the complaints should not have been dismissed *in toto* and therefore remand the cause for consideration of the merits.

The district court held that the action against the Attorney General and the United States Attorney, "being ancillary to the claims against the Congressional defendants," must fall with the action against the Congressional defendants.[5] But as early as *Stockdale* v. *Hansard,* 9 Ad. & El. 1 (1839), and certainly by the time of *Kilbourn* v. *Thompson,* 103 U.S. 168, it was clearly established that liability, including personal tort liability, could be imposed on an official for following orders given to him by the legislature, even though the legislators could not be held personally accountabe. This is exactly what happened to the Sergeant-at-Arms of the House in *Kilbourn.* The

[4] Apparently the reason for the Supreme Court's order was its view that Rule XI of the House Committee was not equivalent to an Act of Congress, so that a 3-judge court was not required under 28 U.S.C. §§ 2282 and 2284. *Krebs* v. *Ashbrook,* 275 F. Supp. 111 (D.D.C. 1967), affirmed, 407 F. 2d 306 (D.C. Cir. 1969), certiorari denied, 393 U.S. 1026. See also *Powell* v. *McCormack,* — U.S. —, —, note 3.

[5] Dismissal of these executive officers was criticized in Comment, 43 N.Y.U. L. Rev. 1227, 1228, note 11 (1968).

principle was reaffirmed in *Dombrowski* v. *Eastland,* 387 U.S. 82, where the Supreme Court ordered that a tort action go to trial as against Senate Subcommittee Counsel Sourwine, while at the same time dismissing the action as against Senator Eastland.

In *Powell* v. *McCormack,* — U.S. —, the Supreme Court recently construed the scope of the defense provided by the Speech or Debate Clause. The Court found it unnecessary to decide (1) whether the Clause would be a bar if the Congressmen were not acting in the sphere of legitimate legislative activity, or (2) assuming that they were acting in the sphere of legitimate legislative activity, whether the fact that the petitioners were not seeking damages or a criminal prosecution would lift the bar of the Clause. The Court decided only that agents and employees of the House who were joined as defendants were not entitled to plead the Speech or Debate Clause as a bar to maintenance of an action against them. Although not determining the applicability of the defense to the Congressmen themselves, the Court dismissed the action against members of the House because "Petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the action to exclude Petitioner Powell" (— U.S. at p. —). The Court felt that the availability of complete relief against non-Congressional defendants was sufficient reason to dismiss the suit against the Congressmen.

Applying this rationale to the present case, we hold that this consolidated action may be dismissed against the Congressmen since plaintiffs have conceded that "a judgment against the prosecutors will afford appellants [plaintiffs] all the relief they request, including a declaratory judgment that Rule XI is unconstitu-

tional, and an injunction restraining prosecution of the criminal cases." Therefore, as in the *Powell* case, we need not decide whether under the Speech or Debate Clause the plaintiffs would be entitled to maintain this action solely against members of Congress where no other remedy was available (see — U.S. at p. —, note 26).

Notwithstanding plaintiff's assertion that continuation of this action against the Attorney General and the United States Attorney will suffice, in view of our decision to dismiss the Congressional defendants from this action, it may develop that complete relief cannot be accorded plaintiffs in the event that they are successful on the merits unless appropriate agents of the House Committee are served and joined as defendants below. Fed. R. Civ. P. 19(a)(1). Because of the effect of the *Powell* decision, which was announced after the appeal in the present action was filed, this case will be remanded with leave to amend the complaint to add such additional parties defendant if the plaintiffs so request. Cf. *Bryan* v. *Austin,* 354 U.S. 933. Since the Congressional defendants have had notice of the pendency of this action from its inception, no prejudice will result from permitting the joinder of agents of the Committee for the sole purpose of making effective relief possible in this declaratory and injunctive action. See *County Theatre Co.* v. *Paramount Film Distr. Corp.,* 166 F. Supp. 221 (E.D. Pa. 1958); *Denver* v. *Forbes,* 26 F.R.D. 614 (E.D. Pa. 1960). In addition, the defense of Congressional immunity was not raised until late in the proceedings, and while we need not now decide whether this affirmative defense was waived by failure to raise it earlier (see 287 F. Supp. at p. 740, note 1), the interests of justice will be served by permitting amendment, if desired by

plaintiffs, in order to compensate for the effects of this tardily asserted defense.

The Government strongly urges, and the decree below assumes, that these plaintiffs' constitutional claims can be raised by way of motions to dismiss or defenses to their criminal prosecutions, concluding that the district court should have declined to assert jurisdiction over this consolidated declaratory and injunctive action. Although it is true that the substantial constitutional issues raised in the civil complaint might be disposed of in a motion to dismiss the contempt indictments, the two proceedings are by no means coterminous. The criminal proceedings may well result in dismissal, acquittal or conviction without reaching the question of the overbreadth of Rule XI and its alleged chilling effect on the exercise of First Amendment rights. Additionally, more suitable discovery procedures and more liberal rules of evidence are available in the civil action to throw light on the serious constitutional questions presented. Nor does it appear at this stage of the litigation that a criminal trial would be a more expeditious means of reaching a final resolution. Plaintiffs should not be compelled to go through years of criminal litigation as in *Gojack* v. *United States*, 384 U.S. 702, where the defendant had to stand trial twice, was convicted twice, appealed unsuccessfully twice, obtained a new trial from the Supreme Court and finally the dismissal of charges against him in the Supreme Court.

We are of the opinion that under the circumstances of this case the district court should not abstain from asserting jurisdiction over complaints challenging a rule or statute "justifiably attacked on [its] face as abridging free expression, or as applied for the purpose of discouraging protected activities." *Dombrow-*

ski v. *Pfister,* 380 U.S. 479, 489–490, see also *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519, 523 (D.C. Cir. 1965). Even more than in *Dombrowski,* these plaintiffs are entitled to an adjudication of their civil complaint. There the allegedly overbroad statute was new and had not been judicially construed, so that any threat to free expression might have been obviated *ad limine.* Here it is alleged that the interpretation put on Rule XI during the approximately 30 years of the Committee's existence exacerbates the overbreadth of the Rule. In *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966), we held that these complaints present a substantial constitutional question, and that the breadth of Rule XI should be measured against the Committee's conduct over the years. Cf. *Watkins* v. *United States,* 354 U.S. 178, 198, 202; *Gojack* v. *United States,* 384 U.S. 702, 711–712. Our *Stamler* opinion contemplated that this re-examination was to occur in this proceeding rather than in subsequent criminal proceedings. Therefore, we hold that the civil litigation should proceed to the long-delayed trial on the merits.

We conclude that plaintiffs' claims should be considered on the merits even though a coordinate branch of the Government is involved. The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government.[6] Thus the Supreme Court has overturned a major policy decision of the President because he exceeded his powers in seizing the steel mills. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579. And the Court has ruled that an Act of Congress designed to prevent members

[6] See Legislative Exclusion: Julian Bond and Adam Clayton Powell, 35 Univ. of Chi. L. Rev. 151, 164–166 (1967).

of the Communist Party from holding jobs in defense facilities, and action taken pursuant to that Act by the Secretary of Defense, was unconstitutional because it placed a greater restraint on First Amendment freedoms than was necessary to guard against espionage and sabotage. *United States* v. *Robel,* 389 U.S. 258. Most recently, the Court determined that federal courts have jurisdiction to review the lawfulness of the exclusion of a duly elected member of Congress despite the constitutional authority of the House to judge the qualifications of its members. *Powell* v. *McCormack,* — U.S. —. The Congress has no more right, whether through legislation or investigations conducted under an overbroad enabling Act, to abridge the First Amendment freedoms of the people, than do the other branches of government, "For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski* v. *Pfister, supra,* at p. 486. As Judge Medina observed in *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817, 824–825 (2d Cir. 1967):

> "Where basic constitutional rights are imperiled, the courts have not required a series of injured parties to litigate the permissible scope of the statute or administrative interpretation but have nullified the unconstitutional action and required the government to start in the first instance with a statute or interpretation that will not so overhang free expression that the legitimate exercise of constitutionally protected rights is suppressed."

There *Dombrowski* was applied to prevent federal interference with First Amendment rights (372 F. 2d at p. 824).

If these plaintiffs should ultimately prevail in this consolidated action, members of Congress will not be

imperiled in their Congressional functions but merely have to conduct their future investigations under a narrower, constitutional mandate. A decision for plaintiffs here would signify no less respect for a coordinate branch of the Government then would a like decision in the criminal prosecutions. Thus permitting this action to proceed will have no chilling effect on the legislators' performance of their duties. Cf. Note, 78 Harv. L. Rev. 1473, 1475 (1965).

Relying on *Golden* v. *Zwickler,* 394 U.S. 103, the defendants argue that the present controversy was rendered moot by the filing of the indictments against plaintiffs. There Zwickler's conviction under a New York statute had been reversed, and the state proceedings were at an end. Therefore, when the Congressman who was the object of Zwickler's critical handbill became a judge, the Court found that no concrete question remained to justify continuing the federal declaratory judgment action. In contrast, the United States has indictments for contempt pending against these plaintiffs, so that the issues raised in this consolidated action are still very much alive and suitable for declaratory relief. See *Dombrowski* v. *Pfister,* 380 U.S. 479, 488 and note 5.[7]

While this case proceeds to trial,[8] the trials of the related criminal cases must be deferred. We will

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[7] In view of the pendency of the indictments, we must also reject the argument that the subsequent formal changes in Rule XI and in the name of the Committee renders the case moot. See *Powell* v. *McCormack,* —, U.S. —, —.

[8] The Government has taken the opportunity of this appeal to reargue questions of standing, jurisdiction, justiciability, venue, separation of powers, want of equity, and substantiality of the federal questions presented by the complaints. Such contentions have been considered and decided adversely to the Government in *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966), and in the unanimous November 8, 1967, denial of the Govern-

assume that the remaining defendants will abide by this judgment without the necessity of entering injunctive relief against the present prosecution of those indictments.

Judgment affirmed as to dismissal of the Congressional defendants; judgment reversed and remanded as to the dismissal of the remaining defendants.

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ment's motion to dismiss and need not be reconsidered here. On remand the parties should develop the necessary factual predicate and direct their legal arguments to the substantive questions of the constitutionality of Rule XI raised in the original complaints.

APPENDIX B

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois 60604

No. 17406, 17407

Tuesday, August 5, 1969

Before Hon. LUTHER M. SWYGERT, Circuit Judge, Hon. WALTER J. CUMMINGS, Circuit Judge, Hon. JESSE E. ESCHBACH, District Judge

JEREMIAH STAMLER, M.D., AND YOLANDA F. HALL, PLAINTIFFS-APPELLANTS, AND MILTON M. COHEN, INTERVENING PLAINTIFF-APPELLANT

vs.

HON. EDWIN E. WILLIS, ET AL., DEFENDANTS-APPELLEES

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED as to dismissal of the Congressional defendants; and judgment is REVERSED and REMANDED to the said District Court as to the dismissal of the remaining defendants, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs of this appeal be divided equally between the plaintiffs-appellants and the intervening plaintiff-appellant on the one side and the defendants-appellees on the other side.

363-962—69——3

APPENDIX C

In the United States District Court for the Northern District of Illinois, Eastern Division

No. 65 C 800 and No. 65 C 2050 (Consolidated)

JEREMIAH STAMLER, M.D. AND YOLANDA F. HALL, PLAINTIFFS, AND MILTON M. COHEN, INTERVENING PLAINTIFF

v.

HON. EDWIN E. WILLIS, HON. JOHN M. ASHBROOK, HON. DEL CLAWSON, HON. JOE R. POOL, HON. CHARLES L. WELTNER, HON. WILLIAM M. TUCK, HON. RICHARD H. ICHORD, HON. GEORGE F. SENNER, JR., AND HON. JOHN H. BUCHANAN, JR., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF THE COMMITTEE ON UN-AMERICAN ACTIVITIES OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS

Fresh Decree

Julius J. Hoffman, District Judge. The plaintiffs, Jeremiah Stamler, M.D., and Yolanda F. Hall, and the intervening plaintiff, Milton M. Cohen, (hereinafter referred to as "plaintiffs") brought two actions against the chairman and members of the Committee on Un-American Activities of the United States House of Representatives. The Committee had scheduled hearings at Chicago, Illinois, for May 25 through May 27, 1965, and the plaintiffs were subpoenaed to appear and give testimony.

The first action brought by the plaintiffs challenged the constitutionality of the Legislative Reorganization Act of 1946, 60 Stat. 812, 828 (1946), which

embodies Rule XI of the Rules of the House of Representatives establishing the charter of the House Un-American Activities Committee. A three-judge District Court was requested under 28 U.S.C. §§ 2283, 2284 and the plaintiffs prayed for an injunction restraining the members of the committee from conducting any hearings and taking any action to enforce the subpoenas served upon the plaintiffs. The action was dismissed by the District Court for lack of a substantial federal question, and the application for a three-judge Court was denied.

The Committee conducted the scheduled hearings and the plaintiffs attended but refused to testify. The plaintiffs then commenced a second action, again challenging the constitutionality of House Rule XI and requesting the convocation of a three-judge District Court. The plaintiffs prayed for a temporary and permanent injunction against the operation, enforcement or execution of House Rule XI and against the future prosecution of the plaintiffs for contempt of Congress under 2 U.S.C. § 192.

House Rule XI provides, in pertinent part:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of Un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and Un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

The complaint alleged that this Rule is illegal and void as applied to the plaintiffs, and as utilized by the

defendants and their predecessors in the past, in that it violates the First, Fifth, Ninth and Tenth Amendments to the United States Constitution. Without reaching the question of the substantiality of the constitutional issues, the District Court denied the application for a three-judge court and dismissed the complaint for lack of a justiciable controversy.

Appeals from the decisions of the District Court in both actions were taken to the Court of Appeals for the Seventh Circuit. The reviewing court reversed and remanded the cases to the District Court with directions to grant the requests for a three-judge Court. *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966).

After remand, the three-judge District Court was convened and the cases were consolidated for trial. During the summer of 1967 the plaintiffs moved for a temporary restraining order preventing the defendants from seeking to secure indictments against them for violations of 2 U.S.C. § 192. The motion was presented to the single District Judge who had previously been advised that the Speaker of the House of Representatives had certified facts constituting the alleged illegal conduct of the plaintiffs to the United States Attorney and that the Attorney General and the United States Attorney were going to present the alleged contempt charges to the grand jury. While this motion was under advisement, the plaintiffs moved for leave to file a First Supplement to the Complaints indicating the action taken by the House of Representatives and for leave to add the United States Attorney and the Attorney General as parties defendant. Leave to file the Supplement was granted but the motion to add additional parties was denied. Thereafter the single Judge denied the motion for a restraining order and the plaintiffs were

indicted for contempt of Congress in violation of 2 U.S.C. § 192. The initiation of the criminal prosecutions was pleaded in a Second Supplement to the complaints and the plaintiffs prayed for an injunction against the prosecutions. Leave to file the Second Supplement and to add the Attorney General and the United States Attorney as parties defendant was allowed. The criminal actions are pending.

The Congressional defendants moved to dismiss the complaints as supplemented and that motion was denied. All the defendants then answered and filed a motion for summary judgment and several discovery motions which were taken under advisement. Thereafter the Congressional defendants moved to stay discovery and to dismiss the actions for lack of jurisdiction on the ground that they are immune from suit under the Speech or Debate Clause, United States Constitution, Article 1, §6, Clause 1. All nine Congressional defendants filed Claims of Privilege and Exemption from Suit. The cases were then before the three-judge court for decision on the motion of all defendants for summary judgment, two discovery motions and the Congressional defendants' motion to stay discovery and dismiss the complaints.

For reasons to be discussed more fully hereinafter, the three-judge court dismissed the actions, Judge Cummings dissenting. *Stamler* v. *Willis,* 287 F. Supp. 734 (N.D. Ill. 1968). Appeals from the judgment of the three-judge court were then taken directly to the Supreme Court. On November 25, 1968, however, the Supreme Court granted the defendants' motion to dismiss the appeals and entered an order dismissing the appeals. 37 U.S. Law Week 3193 (November 26, 1968). On January 20, 1969, the Supreme Court denied the plaintiffs' motion for a rehearing on the defendants' motion to dismiss the appeals. Contempo-

raneously the Supreme Court granted plaintiffs' motion to amend the judgment entered on the order of November 25, 1968 dismissing the appeals, and entered the following order:

> "The judgment dismissing the appeals is vacated and a new judgment will issue providing that the judgment below be vacated and the cases be remanded to the District Court so that it may enter a fresh decree from which timely appeals may be taken to the Court of Appeals." 37 U.S. Law Week 3261 (January 21, 1969).

Pursuant to the order and mandate of the Supreme Court, these consolidated cases have been remanded to the district judge to whom they were originally assigned. The three-judge court has acknowledged that it is without jurisdiction. The issues with which this court is now confronted are the same as those which were dealt with by the three-judge court on June 26, 1968.

The issue raised by the pending motion to dismiss the actions as to the Congressional defendants is the availability to them of the immunity granted legislators under the Speech or Debate Clause. That Clause provides: "[F]or any Speech or Debate in either house [the members of Congress] shall not be questioned in any other place." The defendants urge their claimed immunity as a jurisdictional impediment to the present actions which seek injunctive relef against them based on alleged illegitimate legislative activities. Reliance is placed on the opinion of Judge Burger in *Powell* v. *McCormack,* 395 F. 2d 577 (D.C. Cir. 1968). In that case the plaintiff, Member-Elect Adam Clayton Powell, Jr., brought suit against several members of the 90th Congress to restrain the enforcement, operation or execution of House Resolution No. 278 whereby Member-Elect Powell was ex-

cluded from membership in the 90th Congress, and to restrain the defendants and the full House of Representatives from taking any action to enforce House Resolution No. 278. Judge Burger reached the conclusion that the Speech or Debate Clause operated as a bar to the maintenance of Mr. Powell's suit.

The Speech or Debate Clause has been the subject of only four Supreme Court decisions: *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); *United States* v. *Johnson,* 383 U.S. 169 (1966); and *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967). These cases teach that the Clause confers personal immunity on members of Congress to protect the legislative process in our system of government, and that the Clause must be read broadly to effectuate its purposes. Under these cases Congressmen are insulated from criminal sanction and civil liability if they are engaged in legitimate legislative activity such as the conduct of Congressional committee hearings. However, the Supreme Court has not decided the questions raised by the present motion to dismiss. Those questions are whether the legislative immunity provided by the Speech or Debate Clause may be asserted in an action seeking only equitable relief and a declaratory judgment, and in an action brought to redress a deprivation of First Amendment rights.

The nature of the remedy sought by a litigant does not determine whether the legislator engaged in legitimate legislative activity shall be called to answer before the Judiciary. The Clause must operate to prevent intimidation by the executive and accountability before a possibly hostile judiciary. *United States* v. *Johnson, supra* at 181. The doctrine of immunity should protect the legislator not only from the consequences of the results of the litigation, but also from

the burden of defending himself. *Dombrowski* v. *Eastland, supra* at 85. The Clause itself is the only constitutional provision wherein the doctrine of separation of powers is explicit and its history indicates that any matter concerning either House of Congress should be examined and adjudged in the House to which it relates, and not elsewhere. The precedents, the history of the provision and the required broad reading of the Clause dictate the conclusion that the kind of relief prayed against the legislator has no effect on the availability of the defense of immunity.

The conflict between First Amendment rights and legislative action was examined in *Bond* v. *Floyd*, 385 U.S. 116 (1966). In that case the question was whether a state House of Representatives could constitutionally exclude a duly elected Representative from membership because of his statements criticizing the policy of the Federal Government. The Court found that the disqualification of the plaintiff Bond from the Georgia House of Representatives violated the plaintiff's right of free expression under the First Amendment. The basis of the Court's decision was the First Amendment requirement that legislators be given the widest latitude to express their views on issues of policy. See Note, 62 Nw. U.L. Rev. 640, 647 (1967). However, the defendants did not raise the issue of legislative immunity under the equivalent of the Speech or Debate Clause in the Georgia Constitution and the Court did not consider the collision of the plaintiff's First Amendment rights as a legislator and the defendants' similar rights under a specific constitutional provision.

In the cases at bar, the Court is confronted with an asserted deprivation of First Amendment rights and the constitutional doctrine of legislative immunity. The Court finds that the freedom of expression protected

by the Speech or Debate Clause outweighs the similar protection of the First Amendment. "The mandate of the Speech or Debate Clause is explicit: A member of Congress shall not be required to answer in the Courts for any speech within the scope of his legislative activity. If that speech impinges upon another's First Amendment rights, the former must prevail. The balance of the rights pleaded by the parties favors the Congressional defendants."

The more vital question presented by the motion to dismiss is whether the Congressional defendants were engaged in legitimate legislative activity. The Congressional defendants have been charged with "pillorying" the plaintiffs and other witnesses who have appeared before the Committee, exposing them to public scorn and obloquy, harassment and intimidation with the purpose of deterring them and others in the exercise of their First Amendment rights. Further the plaintiffs complain that the continued conduct of the Committee members attributes a meaning to House Rule XI which renders it unconstitutional.

Essentially the plaintiffs challenge the motive of the defendants. The Court cannot act on this challenge and probe the motivation of the individual legislator; [t]he claim of an unworthy purpose does not destroy the [Speech or Debate] privilege." *Tenney* v. *Brandhove,* supra at 377. Rather, in determining whether the defendants were engaged in legitimate legislative activity, the Court should only determine whether the Committee's inquiry may fairly be deemed within its province. The Supreme Court has held:

> "Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political

> passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Jucidiary or the Executive." *Tenney* v. *Brandhove,* supra at 377–378.

The Court concludes that the Chicago hearings conducted by the defendants were within the legitimate province of the Committee. Therefore, the complaint filed against the Congressional defendants must be and is hereby dismissed. The action brought against the Attorney General and the United States Attorney, being ancillary to the claims against the Congressional defendants, will also be dismissed. The remaining motions will be denied as moot.

Dated this 31st day of January, 1969.

JULIUS J. HOFFMAN,
United States District Judge.

APPENDIX D

Supreme Court of the United States

October Term, 1968

STAMLER ET AL.

v.

WILLIS ET AL.

and COHEN

v.

WILLIS ET AL.

Appeals From the United States District Court for The Northern District of Illinois

Nos. 478 and 479. Decided November 25, 1968

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE HARLAN are of the opinion that further consideration of the question of jurisdiction should be postponed to the hearing of the cases on the merits and that the cases be set for oral argument.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

APPENDIX E

Supreme Court of the United States

October Term, 1968

No. 478

STAMLER AND HALL

v.

WILLIS ET AL.

No. 479

COHEN

v.

WILLIS ET AL.

Appeals From the United States District Court for The Northern District of Illinois

Nos. 478 and 479. Decided January 20, 1969

PER CURIAM.

The petition for a rehearing is denied. The motion to amend the judgment entered on November 25, 1968, dismissing the appeals is granted. The judgment dismissing the appeals is vacated and a new judgment will issue providing that the judgment below be vacated and the cases be remanded to the District Court so that it may enter a fresh decree from which timely appeals may be taken to the Court of Appeals.

Mr. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

APPENDIX F

Opinion of three-judge court, June 26, 1968

MEMORANDUM OF DECISION

Before CUMMINGS, Circuit Judge, HOFFMAN and NAPOLI, District Judges

The plaintiffs, Jeremiah Stamler, M.D., and Yolanda F. Hall, and the intervening plaintiff, Milton M. Cohen, (hereinafter referred to as "plaintiffs") brought two actions against the chairman and members of the Committee on Un-American Activities of the United States House of Representatives. The Committee had scheduled hearings at Chicago, Illinois, for May 25 through May 27, 1965, and the plaintiffs were subpoenaed to appear and give testimony.

The first action brought by the plaintiffs challenged the constitutionality of the Legislative Reorganization Act of 1946, 60 Stat. 812, 828 (1946) which embodies Rule XI of the Rules of the House of Representatives establishing the charter of the House Un-American Activities Committee. A three-judge District Court was requested under 28 U.S.C. §§ 2283, 2284 and the plaintiffs prayed for an injunction restraining the members of the committee from conducting any hearings and taking any action to enforce the subpoenas served upon the plaintiffs. The action was dismissed by the District Court for lack of substantial federal question under *Barenblatt* v. *United States,* 360 U.S. 109 (1959) and the application for a three-judge Court was denied.

The Committee conducted the scheduled hearings and the plaintiffs attended but refused to testify. The plaintiffs then commenced a second action, again challenging the constitutionality of House Rule XI and requesting the convocation of a three-judge District Court. The plaintiffs prayed for a temporary and permanent injunction against the operation, enforcement or execution of House Rule XI and against the future prosecution of the plaintiffs for contempt of Congress under 2 U.S.C. § 192.

House Rule XI provides, in pertinent part:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

The complaint alleged that this Rule is illegal and void as applied to the plaintiffs, and as utilized by the defendants and their predecessors in the past, in that it violates the First, Fifth, Ninth and Tenth Amendments to the United States Constitution.

Without reaching the question of the substantiality of the constitutional issues, the District Court denied the application for a three-judge Court and dismissed the complaint for lack of justiciable controversy. The Court found that the plaintiffs lacked standing to raise the constitutional challenge to House Rule XI since they were not in the direct focus of the Rule. The Court concluded that the criminal prosecution

feared by the plaintiffs was not possible until the full House of Representatives considered the facts and the Speaker of the House certified the facts to the United States Attorney and directed him to bring the matter of contempt before the grand jury. 2 U.S.C. § 194. The District Court also noticed that criminal prosecution could be instituted only by the United States which was not a party to the action.

Appeals from the decisions of the District Court in both actions were taken to the Court of Appeals for the Seventh Circuit. The reviewing court reversed upon concluding that in deciding the question of justiciability in the second action the District Court had improperly considered the merits of the plaintiffs' claim and that both complaints presented a substantial constitutional question. *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966). The Court stated:

> "The complaints alleged generally that the interpretation of section 18 of Rule XI as expressed by the continued conduct of the Subcommittee of the House Un-American Activities Committee attributes a meaning to the rule which renders it unconstitutional, and that this conduct consisted of the exposure of witnesses including plaintiffs, to public scorn and obloquy and harassment and intimidation of these witnesses without any legislative purpose but rather to chill and deter them and others in the exercise of their first amendment rights.
>
> "These allegations raise a substantial constitutional question not foreclosed by the Supreme Court in *Barenblatt* v. *United States,* 360 U.S. 109 (1959)." 371 F. 2d at 414.

The Court also noted that the complaints alleged, at least formally, a basis for equitable relief and that the requirements of the three-judge statute had been met. The cases were remanded to the District Court with

directions to grant the requests for a three-judge Court.

After remand, the three-judge District Court was appointed and the cases were consolidated for trial. During the summer of 1967 the plaintiffs moved for a temporary restraining order preventing the defendants from seeking to secure indictments against them for violations of 2 U.S.C. § 192. The motion was presented to the single District Judge who was advised that the previous fall the Speaker of the House of Representatives had certified facts constituting the alleged illegal conduct of the plaintiffs to the United States Attorney and that the Attorney General and the United States Attorney were going to present the alleged contempt charges to the grand jury. While this motion was under advisement, the plaintiffs moved for leave to file a First Supplement to the Complaints indicating the action taken by the House of Representatives and for leave to add the United States Attorney and the Attorney General as parties defendant. Leave to file the Supplement was granted but the motion to add additional parties was denied. Thereafter the single Judge denied the motion for a restraining order and the plaintiffs were indicted for contempt of Congress in violation of 2 U.S.C. § 192. The initiation of the criminal prosecutions was pleaded in a Second Supplement to the Complaints and the plaintiffs prayed for an injunction against the prosecutions. Leave to file the Second Supplement and to add the Attorney General and the United States Attorney as parties defendant was allowed. The criminal actions are pending.

The Congressional defendants moved to dismiss the complaints as supplemented and that motion was denied. All the defendants then answered and filed a motion for summary judgment and several discovery

motions which were taken under advisement. Next the Congressional defendants moved to stay discovery and to dismiss the actions for lack of jurisdiction on the ground that they are immune from suit under the Speech or Debate Clause, United States Constitution, Article 1, § 6, Clause 1. All nine Congressional defendants filed Claims of Privilege and Exemption from Suit. The cases are now before the Court for decision on the motion of all defendants for summary judgment, two discovery motions and the Congressional defendants' motion to stay discovery and dismiss the complaints.

The issue raised by the pending motion to dismiss the actions as to the Congressional defendants is the availability to them of the immunity granted legislators under the Speech or Debate Clause. That Clause provides: "[F]or any Speech or Debate in either House [the members of Congress] shall not be questioned in any other place." The defendants urge their claimed immunity as a jurisdictional impediment to the present actions which seek injunctive relief against them based on alleged legitimate legislative activities. Reliance is placed on the opinion of Judge Burger in *Powell* v. *McCormack,* — F. 2d — (D.C. Cir. Feb. 28, 1968). In that case the plaintiff, Member-Elect Adam Clayton Powell, Jr., brought suit against several members of the 90th Congress to restrain the enforcement, operation or execution of House Resolution No. 278 whereby Member-Elect Powell was excluded from membership in the 90th Congress, and to restrain the defendants and the full House of Representatives from taking any action to enforce House Resolution No. 278. Judge Burger reached the conclusion that the Speech or Debate Clause operated as a bar to the maintenance of Mr. Powell's suit.

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The Speech or Debate Clause has been the subject of only four Supreme Court decisions: *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *United States* v. *Johnson*, 383 U.S. 169 (1966); and *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967). These cases teach that the Clause confers personal immunity on members of Congress to protect the legislative process in our system of government, and that the Clause must be read broadly to effectuate its purposes. Under these cases Congressmen are insulated from criminal sanction and civil liability if they are engaged in legitimate legislative activity such as the conduct of Congressional committee hearings. However, the Supreme Court has not decided the questions raised by the present motion to dismiss. Those questions are whether the legislative immunity provided by the Speech or Debate Clause may be asserted in an action seeking only equitable relief and a declaratory judgment, and in an action brought to redress a deprivation of First Amendment rights.

The nature of the remedy sought by a litigant does not determine whether the legislator engaged in legitimate legislative activity shall be called to answer before the Judiciary. The Clause must operate to prevent intimidation by the executive and accountability before a possibly hostile judiciary. *United States* v. *Johnson, supra,* at 181. The doctrine of immunity should protect the legislator not only from the consequences of the results of the litigation, but also from the burden of defending himself. *Dombrowski* v. *Eastland, supra* at 85. The Clause itself is the only constitutional provision wherein the doctrine of separation of powers is explicit and its history indicates that any matter concerning either House of Congress should be examined and adjudged in the House to which it

relates, and not elsewhere. The precedents, the history of the provision and the required broad reading of the Clause dictate the conclusion that the kind of relief prayed against the legislator has no effect on the availability of the defense of immunity.

The conflict between First Amendment rights and legislative action was examined in *Bond* v. *Floyd*, 385 U.S. 116 (1966). In that case the question was whether a state House of Representatives could constitutionally exclude a duly elected Representative from membership because of his statements criticizing the policy of the Federal Government. The Court found that the disqualification of the plaintiff Bond from the Georgia House of Representatives violated the plaintiff's right of free expression under the First Amendment. The basis of the Court's decision was the First Amendment requirement that legislators be given the widest latitude to express their views on issues of policy. However, the defendants did not raise the issue of legislative immunity under the equivalent of the Speech or Debate Clause in the Georgia Constitution and the Court did not consider the collision of the plaintiff's First Amendment rights as a legislator and the defendant's similar rights under a specific constitutional provision.

In the cases at bar, we are confronted with an asserted deprivation of First Amendment rights and the constitutional doctrine of legislative immunity. We find that the freedom of expression protected by the Speech or Debate Clause outweighs the similar protection of the First Amendment. The mandate of the Speech or Debate Clause is explicit: A member of Congress shall not be required to answer in the courts for any speech within the scope of his legislative activity. If that speech impinges upon another's First Amendment rights, the former must prevail. The bal-

ance of the rights pleaded by the parties favors the Congressional defendants.

The more vital question presented by the motion to dismiss is whether the Congressional defendants were engaged in legitimate legislative activity. The Congressional defendants have been charged with "pillorying" the plaintiffs and other witness who have appeared before the Committee, exposing them to public scorn and obloquy, harassment and intimidation with the purpose of deterring them and others in the exercise of their First Amendment rights. Further the plaintiffs complain that the continued conduct of the Committee members attributes a meaning to House Rule XI which renders it unconstitutional.

Essentially the plaintiffs challenge the motive of the defendants. The Court cannot act on this challenge and probe the motivation of the individual legislator; "[t]he claim of an unworthy purpose does not destroy the [Speech or Debate] privilege." *Tenney* v. *Brandhove, supra* at 377. Rather, in determining whether the defendants were engaged in legitimate legislative activity, the Court should only determine whether the Committee's inquiry may fairly be deemed within its province. The Supreme Court has held:

> "Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attribtued to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry

> may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Tenney* v. *Brandhove, supra,* at 377–378.

We reach the conclusion that the Chicago hearings conducted by the defendants may fairly be deemed within the province of the Committee. The transcripts of the hearings are attached as exhibits to the complaint filed in the second action and the defendants have filed, in support of the motion for summary judgment, copies of the House reports certifying the facts leading to the Committee request that the plaintiffs herein be cited for contempt and including the underlying resolution and authority of the subcommittee to hold the Chicago hearings, and the background of the witnesses on which was based the Committee decision to subpoena them. These exhibits do not disprove the plaintiffs' allegations that the conduct of the Committee gives an unconstitutional gloss to House Rule XI, but they establish that the Chicago hearings may fairly be deemed to be within the province of the Committee. The questions are not the same. We conclude that the hearings conducted by the defendants constituted legitimate legislative activity.

The defendants raise the immunity under the Speech or Debate provision as a bar to this Court's jurisdiction. Although Judge Burger's opinion supports this view, we disagree and note that the issue has not been decided by the Supreme Court. In order for the Speech or Debate Clause to protect a legislator, it must be demonstrated that he is engaged in legitimate legislative activity. The determination of

such a question is more appropriate in a summary judgment setting. Therefore, we have treated the Claims of Privilege and Exemption from Suit as affirmative defenses to the actions and find, on the defendants' motion for summary judgment, that the Speech or Debate Clause is a complete legal defense to both actions. In view of the fact that the cases were commenced more than three years ago, the Court will not require amended pleadings or new motions for summary judgment presenting the defense of immunity to the Court. We will treat the motion of the Congressional defendants to stay discovery and dismiss the actions under the pending motion for summary judgment and allow both motions of the Congressional defendants. The relief sought against the the Attorney General and the United States Attorney is ancillary to the claims against the Congressional defendants and the actions will be dismissed as to the Attorney General and the United States Attorney. The remaining motions will be denied as moot.

/s/ JULIUS J. HOFFMAN,
United States District Judge.
/s/ ALEXANDER J. NAPOLI,
United States District Judge.

Dated: June 26, 1968.

CUMMINGS, *Circuit Judge,* dissenting. The majority rests its decision on the Speech or Debate Clause contained in Article I, Section 6, Clause 1 of the Constitution, providing "The Senators and Representatives * * * for any Speech, Debate in either

House * * * shall not be questioned in any other Place."[1] This clause is derived from the 1689 English Bill of Rights providing:

> "That the freedom of Speech and Debate or proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament."

This privilege was chiefly intended to protect members of Parliament from criminal charges and libel or slander actions. See *United States* v. *Johnson,* 383 U.S. 169, 182; *The Bribed Congressman's Immunity from Prosecution,* 75 Yale L.J. 335, 341–342 (1965).

In this country, a similar clause in the Massachusetts Constitution of 1780 was first construed in *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808), a slander suit, as enabling members of the legislature "to execute the functions of their office without fear of prosecutions, civil or criminal." At two other places in his opinion, Chief Justice Parsons refers to freedom from "prosecutions." Of course, prosecutions are not involved in the present suit for injunctive and declaratory relief.

The Supreme Court's first consideration of the Speech and Debate Clause came in *Kilbourn* v. *Thompson,* 103 U.S. 169, where it was deemed to give members of a congressional committee a defense against a suit for damages brought by a person im-

[1] By not raising this privilege or immunity in their Answer, which raised nine affirmative defenses, the Congressional defendants have waived it. But since the majority has seen fit to pass upon the merits of this defense, it will also be considered in this dissent.

prisoned for failure to answer certain committee questions and to produce books and papers sought by the committee. In *Kilbourn,* the Court refused to limit this constitutional provision to words spoken in debate, but nevertheless confined its decision to "what is necessary to the case at hand," stating:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." See 103 U.S. pp. 204–205.

The next Supreme Court consideration of this clause came in another suit where the plaintiff sought damages from members of a legislature. *Tenney* v. *Brandhove,* 341 U.S. 367. There Justice Frankfurter concluded that the clause applied to immunize legislators from such actions if "from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity" (at p. 376). After stating that the purpose of the clause was to free members of the legislatures from "criminal and civil liability," the *Tenney* opinion adhered to the caveat expressed in the *Kilbourn* case that members of the legislature might be held responsible for doing things "of an extraordinary character" (at pp. 375, 378).

The Supreme Court again considered this clause in *United States* v. *Johnson,* 383 U.S. 169, where it was applied to bar a criminal prosecution against a former congressman. Again the Court was careful to limit its holding to the circumstances presented (at p. 185).

The last Supreme Court consideration of this clause occurred in the *per curiam* opinion in *Dombrowski* v. *Eastland,* 387 U.S. 82, another damage action. The Court reiterated the *Tenney* concept that legislators should be protected from the burden of defending themselves when engaged "in the sphere of legitimate

legislative activity" (p. 85). In contrast, here the Congressional defendants are being fully defended by the Government, as provided by 2 U.S.C. § 118, with no possibility of monetary liability.

This review of the leading authorities construing the Speech or Debate Clause shows that until today no court has applied it to an action seeking injunctive or declaratory relief. It is true that in *Powell* v. *McCormack*, ---- F.2d ---- (D.C. Cir. 1968), Judge Burger concluded that the clause applied to an action seeking equitable relief, but neither Judge McGowan nor Judge Leventhal agreed with him, and they reached certain aspects of the merits of the *Powell* complaint.

In my view, the immunity extended by the Speech or Debate Clause is limited to judicial proceedings in which individual legislators are sought to be rendered personally liable, civilly or criminally, for activities stemming from a privileged range of conduct. The immunity does not extend to actions for declaratory and injunctive relief in which, as here, Congressmen are only parties in their official capacity.

As explained in *United States* v. *Johnson, supra,* p. 180, the state legislators' privilege is on a parity with the federal privilege arising from the Speech or Debate Clause. In fact, at least 43 states have constitutional provisions equivalent to that clause. (See *Tenney* v. *Brandhove, supra,* at p. 375, note 1; 1 Alaska Stats. p. 231; Rev. Laws of Hawaii, 1963 Supp. p. 11). Despite such state constitutional provisions, injunctive relief has often been accorded against members of state legislatures, showing that injunctive relief is also not barred by the Speech or Debate Clause of the federal Constitution. Thus in *Dombrowski* v. *Pfister,* 380 U.S. 479, it was held that the plaintiffs were entitled to declaratory and injunctive relief against the chairman of a joint committee

of the legislature and others. A few years later, in *Bond* v. *Floyd,* 385 U.S. 116, the Court again held that a plaintiff was entitled to declaratory and injunctive relief against members of a state legislature even though the Supreme Court of Georgia had interpreted its Speech or Debate Clause as barring actions for declaratory relief against legislators. *Village of North Atlanta* v. *Cook,* 219 Ga. 316, 133 S.E. 2d 585 (1963). The rationale of the *Dombrowski* and *Bond* decisions applies equally to members of the United States House of Representatives.

Similarly, in *Liveright* v. *Joint Committee,* 279 F. Supp. 215 (M.D. Tenn. 1968), an injunction was entered against members of a joint committee of the Tennessee Assembly and other members of the legislature, restraining them from proceeding under a vague and overbroad resolution (narrower than Rule XI) authorizing the investigation of the Highlander Research Center of Knox County. To like effect, see *Bush* v. *Orleans Parish School Board,* 191 F. Supp. 871 (E.D. La. 1961), affirmed, 367 U.S. 908; *Jordan* v. *Hutcheson,* 323 F. 2d 597, 601–602 (4th Cir. 1963).

Thus in the foregoing cases, the Supreme Court and other federal courts have approved declaratory and injunctive relief against legislators. The instant decision is the first known Speech or Debate Clause ruling to the contrary.

Under the allegations of this complaint, the House Committee on Un-American Activities has engaged in a consistent course of conduct whose effect is to stifle freedom of association and criticism of the government.[2] The Speech or Debate Clause was designed to en-

[2] Unlike *Tenney* v. *Brandhove, supra,* the motives of these Congressional defendants are nowhere challenged. It is the effect of their conduct that is at issue here, not their motives.

courage just such criticism. Its prophylactic purpose reflected "the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments." *United States* v. *Johnson, supra,* at p. 182, note 12. Its purpose should not be subverted by employing it to deny relief to these plaintiffs. This is especially true when the clause has never before been applied to actions for injunctive or declaratory relief in the nearly 180 years of its operation. In fact, the novelty of the Government's position is shown by its not having raised this clause during the first two and one-half years this case has been pending!

Even assuming *arguendo* the correctness of Judge Burger's views in *Powell* v. *McCormack,* that case is not controlling here. There the relief sought would force the seating of Congressman-Elect Powell, whereas if these plaintiffs should prevail on the merits, Congress could enact a narrower enabling Act and continue its investigations thereunder. In *Powell,* the plaintiff had no alternative way of presenting his constitutional claim in a judicial proceeding, whereas here the majority opinion admits that these plantiffs' constitutional claims can be entertained in their criminal trials. If they should prevail on this point in those trials, the result would in effect be a judicial decision that Rule XI is unconstitutionally broad, the very result sought here. An unfavorable decision here would signify no less respect for a coordinate branch of the Government than would a like decision in the criminal prosecutions. The fact that plaintiffs can test the issues presented here in their criminal prosecutions is no reason to deny them standing in this proceeding. *Flast* v. *Cohen,* 36 U.S. Law Week 4601. As

Judge Medina observed in *Wolff* v *Selective Service Local Board No. 16,* 372 F. 2d 817, 824–825 (2d Cir. 1967):

> "Where basic constitutional rights are imperiled, the courts have not required a series of injured parties to litigate the permissible scope of the statute or administrative interpretation but have nullified the unconstitutional action and required the Government to start in the first instance with a statute or interpretation that will not so overhang free expression that the legitimate exercise of constitutionally protected rights is suppressed."

There *Dombrowski* v. *Pfister, supra,* was applied to prevent federal interference with First Amendment rights (at p. 824).

In sum, the Speech or Debate Clause protects legislators from imprisonment or money judgments that would adversely affect their ability to perform their Congressional duties. But if these plaintiffs were to prevail in this case, the defendant members of Congress would not be impeded in their Congressional functions but merely have to conduct their future investigations under a narrower, constitutional mandate. Thus permitting this action to proceed will have no chilling effect on the legislators' performance of their duties. Cf. Note, 78 Harv. L. Rev. 1473, 1475 (1965).

The Court of Appeals for this Circuit has previously recognized the different impact of damages and injunctive actions, stating as follows in *Adams* v. *City of Park Ridge,* 293 F. 2d 585, 587 (7th Cir. 1961):

> "* * * the case at bar is not an action for damages for torts committed. It looks to the future only and asks for a declaratory judgment and an injunction against invasions of plaintiffs' federal constitutional rights contemplated by a municipality's ordinance. None of the reasons

> which supports a city's immunity from an action for damages for tortious injuries already inflicted by its officers, agents or servants applies to this case. No reason is apparent why a city and its officials should not be restrained from prospectively violating plaintiffs' constitutional rights pursuant to its own legislative enactment, and an injunction not be granted as provided in § 1983."

Similarly here, the reasons supporting Congressional immunity in criminal prosecutions or in damage actions do not apply to this case. Cf. *Flast* v. *Cohen,* 36 U.S. Law Week 4601, 4610, n. 6 (concurring opinion).

By belated resort to the Speech or Debate Clause, this Court should not evade the mandate of *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966), holding that this complaint presents a substantial constitutional question, and that the breadth of Rule XI should be measured against this Committee's conduct over the years. Cf. *Watkins* v. *United States,* 354 U.S. 178, 198, 202; *Gojack* v. *United States,* 384 U.S. 702, 711–712. The *Stamler* opinion contemplated that this judicial re-examination was to occur in this proceeding rather than in subsequent criminal proceedings. By settling the questions raised by this complaint in this civil proceeding, future interference with Committee activity would be eliminated. Unlike the now pending criminal prosecutions, more suitable discovery procedures and more liberal rules of evidence are available here to throw light on the serious constitutional questions presented. These questions are surely weighty enough to call for adjudication by three judges rather than a single judge hearing the criminal cases. Moreover, direct Supreme Court resolution is available upon appeal from the judgment on the merits by this 3-judge court. See *Zemel* v. *Rusk,* 381 U.S. 1, 5–7. Defendants have not shown why defense

of this proceeding would be significantly more burdensome than would their cooperation in the prosecution of these plaintiffs under 2 U.S.C. § 192.

These plaintiffs, like those in *Dombrowski* v. *Pfister*, 380 U.S. 479, should be permitted to raise these questions in a civil proceeding not inhibiting the full exercise of their First Amendment rights. They should not have to go through years of criminal litigation as in *Gojack* v. *United States*, 384 U.S. 702, where the defendant had to stand trial twice, was convicted twice, appealed unsuccessfully twice, obtained a new trial from the Supreme Court and finally the dismissal of charges against him in the Supreme Court.

Even more than in *Dombrowski* v. *Pfister, supra*, these plaintiffs are entitled to an adjudication of their civil complaint. There the allegedly overbroad statute was new and had not been judicially construed, so that any threat to free expression might have been obviated *ad limine*. Here it is alleged that the interpretation put on Rule XI during the approximately 30 years of the Committee's existence exacerbates the overbreadth of the Rule, and it has already been held that plaintiffs' allegations raise a substantial constitutional question (*Stamler* v. *Willis, supra*). Therefore, *Dombrowski* surely requires this Court to permit this civil litigation to proceed.

In denying the Government's motion to dismiss, this Court has already determined that plaintiffs' claims should be considered on their merits even though a coordinate branch of the Government is involved. The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government.[3] Thus the Supreme Court has overturned a

[3] See *Legislative Exclusion: Julian Bond and Adam Clayton Powell*, 35 Univ. of Chi. L. Rev. 151, 164–166 (1967).

major policy decision of the President because he exceeded his powers in seizing the steel mills. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579. More recently, the Court has ruled that an Act of Congress designed to prevent members of the Communist Party from holding jobs in defense facilities, and action taken pursuant to that Act by the Secretary of Defense, was unconstitutional because it placed a greater restraint on First Amendment freedoms than was necessary to guard against espionage and sabotage. *United States* v. *Robel,* 389 U.S. 258. Although the Speech or Debate Clause protects individual legislators against personal liability for their legislative acts, it cannot foreclose judicial inquiry into the constitutionality of the Committee of which they are members. The Congress has no more right, whether through legislation or investigations conducted under on overbroad enabling Act, to abridge the First Amendment freedoms of the people than do the other branches of government, "For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski* v. *Pfister, supra,* at p. 486.

As shown in the *Tenney* case, and reiterated in *Dombrowski* v. *Eastland, supra,* the Speech or Debate Clause was meant to apply to legislators engaged in the sphere of legitimate legislative activity. In *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966), the Court decided there was a substantial question whether these legislators were so engaged. In that vein, this Court has already unanimously denied the Government's motion to dismiss and permitted limited discovery and should not now back-track from the forthright position previously taken merely to avoid passing upon the difficult and weighty questions presented.

The majority states that the action against the Attorney General and the United States Attorney must fall with the action against the Congressional defendants because the actions against the former are "ancillary." But as early as *Stockdale* v. *Hansard*, 9 Ad. & El. 1 (1839), and certainly by the time of *Kilbourn* v. *Thompson, supra*, it was clearly established that liability, including personal tort liability, could be imposed on an official for following orders given to him by the Congress, even though the Congressman could not be held. This is exactly what happened to the Sergeant-at-Arms of the House in *Kilbourn*. The principle was recently reaffirmed in *Dombrowski* v. *Eastland*, 387 U.S. 82, where the Supreme Court ordered that a tort action go to trial as against Senate Subcommittee Counsel Sourwine, while at the same time dismissing the action as against Senator Eastland. There is therefore no legal bar to the continuation of this action as against defendants Clark and Foran. I would hold that this action should proceed against the Congressional defendants as well.

For these reasons, I am unable to join in the judgment order being entered.

/s/ WALTER J. CUMMINGS,
United States Circuit Judge.

Dated: June 26, 1968.

APPENDIX G

In the United States Court of Appeals for the Seventh Circuit

September Term and Session, 1966

Nos. 15268, 15269, 15668, 15669

NOVEMBER 10, 1966

JEREMIAH STAMLER, M.D. and YOLANDA F. HALL, PLAINTIFFS-APPELLANTS

MILTON M. COHEN, INTERVENING PLAINTIFF-APPELLANT

v.

HONORABLE EDWIN E. WILLIS, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF THE COMMITTEE ON UN-AMERICAN ACTIVITIES OF THE UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS-APPELLEES

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

Before KNOCH, KILEY, and CUMMINGS, Circuit Judges

KILEY, *Circuit Judge.* Plaintiffs appeal from a judgment of the district court denying their motion for a three-judge court[1] and dismissing their complaints. We order the judgment vacated.[2]

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[1] 28 U.S.C. § 2282 (1964):

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title."

[2] Since the issues raised by the first complaints, filed the day

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Since this court has no greater jurisdiction in this case than the single district judge, the sole question is whether the complaints presented a substantial constitutional question so as to deprive the district court of jurisdiction to dismiss the complaints.

The district court did not reach this question, but dismissed on the basis of rulings on "threshold questions" as to the propriety of a decision on the merits. But in our view, the district court, in reaching its conclusions on the "threshold questions," relied in part upon decisions on the merits of the case presented and in doing so exceeded the single-judge preliminary inquiry jurisdiction. We think that if the complaints present a substantial constitutional question, the three-judge court request ought to be granted, since there is no doubt that the complaints "at least formally allege a basis for equitable relief * * *" and that "the case presented otherwise comes within the requirements of the three-judge statute." [3] *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962).

The complaints alleged generally that the interpretation of section 18 of Rule XI [4] as expressed by the continued conduct of the Subcommittee of the House Un-American Activities Committee attributes a meaning to the rule which renders it unconstitutional, and that this conduct consisted of the exposure of wit-

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before the hearings, are substantially the same as those raised by the second complaints, we need discuss only the second.

[3] There is no doubt that a single district judge, where a three-judge court is requested, may consider the question of his own jurisdiction in an appropriate case. *E.g.*, *Lion Mfg. Corp.* v. *Kennedy*, 330 F. 2d 833 (D.C. Cir. 1964).

[4] Legislative Reorganization Act of 1946, 60 Stat. 812, 818, as adopted by the Eighty-Ninth Congress. H.R. 8, 89th Cong., 1st Sess., 111 CONG. REC. 21 (1965).

nesses, including plaintiffs, to public scorn and obloquy and harassment and intimidation of these witnesses without any legislative purpose but rather to chill and deter them and others in the exercise of their first amendment rights.

These allegations raise a substantial constitutional question not foreclosed by the Supreme Court in *Barenblatt* v. *United States*, 360 U.S. 109 (1959).

In *Barenblatt* the Court rejected the contention that Rule XI was unconstitutionally vague in delineating the limits of Subcommittee inquiry when judged, as it must be, in the concrete. The Court held that the Committee's history and the "persuasive gloss of legislative history" disclosed authority, unassailable on grounds of vagueness, to investigate Communist influence in education. 360 U.S. at 122. On the issue of violation of first amendment rights, the Court said "there is no indication in this record that the Subcommittee was attempting to pillory witnesses." 360 U.S. at 134. Here it is alleged that Rule XI, section 18, is unconstitutional as continually interpreted by the Subcommittee to justify the effectual "pillorying" of plaintiffs and other witnesses.[5] We think the Court's language in *Gojack v. United States*, 384 U.S. 702 (1966), supports our conclusion that the com-

[5] Because of the allegations here of the Subcommittee conduct giving an unconstitutional meaning to the statute, this case is distinguished from those where unconstitutional conduct under color of a valid statute is alleged. *Ex parte Bransford*, 310 U.S. 354 (1940). It is well established that the meaning of a statute must not be derived solely from its abstract terms, "unrelated to the definite content furnished them by the course of congressional actions." *Barenblatt* v. *United States*, 360 U.S. 109, 117 (1959).

plaints raise a question not foreclosed by *Barenblatt*: "*In the circumstances of that case* [*Barenblatt*], the Court sustained the constitutionality of the investigation. * * *" (Emphasis added.) *Id.* at 706. We hold that a substantial constitutional question was presented and that the district court had no jurisdiction to dismiss the complaints.

The cause is remanded with directions to vacate the judgment and to grant the request for a three-judge court.

KNOCH, *Circuit Judge.* (dissenting) Reluctantly I find myself in disagreement with my colleagues. It seems to me that the District Judge properly considered the threshold questions of standing to sue and the propriety of the remedies sought. As indicated in his original ruling involved in appeals Nos. 15268 and 15269, he was of the opinion that a substantial constitutional question had not been presented at that time. Similarly, there is an indication that he was still of that opinion in deciding the later petitions involved in appeals Nos. 15668, and 15669, although he disposed of the matters on the announced threshold grounds. I believe that his actions were correct and his disposition of the matter should be affirmed.

APPENDIX H

Memorandum of Decision Entered by the Honorable Julius J. Hoffman on April 22, 1966

This is an action by Jeremiah Stamler, M.D. and Yolanda F. Hall against the Hon. Edwin E. Willis, Hon. John M. Ashbrook, Hon. Del Clawson, Hon. Joe R. Pool, Hon. Charles L. Weltner, Hon. William M. Tuck, Hon. Richard H. Ichord, Hon. George F. Senner, Jr., and Hon. John H. Buchanan, Jr. The defendants are named as individuals as well as in their capacities as the chairman and members of the Committee on Un-American Activities of the United States House of Representatives. Milton M. Cohen has been granted leave to intervene as a party plaintiff.

The complaint and intervening complaint (hereinafter referred to as the complaint) set forth certain events occurring prior to and during the hearings held at Chi- [1218] cago by the Committee on Un-American Activities on May 25–27, 1965. The plaintiffs and the intervening plaintiff (hereinafter referred to as the plaintiffs) were subpoenaed to appear and give testimony before the Committee during the course of those hearings. An action was unsuccessfully prosecuted before this court at that time in an effort to relieve the plaintiffs of the obligation of appearing at the hearings as witnesses. They subsequently appeared before the Committee but declined to testify.

The complaint describes in detail the procedures of the Committee prior to and during the hearings which

the plaintiffs contend were violations of their constitutional rights and justified their refusal to testify. Further, the complaint challenges the constitutionality of the legislation creating the Committee on Un-American Activities, and therefore, the legality of the hearings held under the authority of that legislation, which is part of the Legislative Reorganization Act of 1946, 60 Stat. 812, 828 (1946), and is included as Rule 11 of the Rules of the House of Representatives, 1946 United States Code Congressional Service 788, 793.

The plaintiffs have moved that a three-judge court be convened to hear this cause and to grant the relief requested. The defendants have moved the court for an order dismissing the complaint and the intervening complaint on several grounds.

The plaintiffs have requested that this court initiate the procedures prescribed in 28 U.S.C. § 2284 by noti-
[1219] fying the Chief Judge of the United States Court of Appeals for the Seventh Circuit of the filing of this complaint and requesting that he designate and empanel a court of three judges to hear and determine this action. Certain observations concerning this request are appropriate at the outset in order to clarify the function, in this situation, of the single district judge to whom such a case is initially presented.

The convocation of a three-judge court is an extraordinary procedure, increasing both expense and delay. *Sankstone* v. *Jarecki,* 116 F. Supp. 422 (N.D. Ill.), *appeal dismissed,* 346 U.S. 861 (1953). Further, decisions of a three-judge court granting or denying injunctive relief are appealable directly to the United States Supreme Court, 28 U.S.C. § 1253, illustrating that resort to the § 2284 procedure poses a potential burden to the appellate docket of the High Court. The gravity of these factors requires a strict construction

of the statutes providing for three-judge panels in order that they will not be improvidently convened. *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 375 (1949).

The plaintiffs contend that a § 2284 court is necessitated in this case pursuant to 28 U.S.C. § 2282, which states:

> "An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

A three-judge court is to be convened only to de- [1220] cide the merits of a claim asserting the unconstitutionality of an Act of Congress, and seeking injunctive relief against its enforcement. The plaintiffs, therefore, occupy an untenable position in contending that the only questions to be considered by this court preliminary to initiating the § 2284 procedures are whether a nonfrivolous constitutional challenge has been made and whether a formal basis for equitable relief has been stated. (See intervening plaintiff's brief of February 21, 1966 at p. 5; plaintiffs' brief of February 23, 1966, at p. 23; intervening plaintiff's reply brief of April 13, 1966, at p. 3; and plaintiffs' brief of April 15, 1966, at p. 11.) On the contrary, although procedure under § 2284 might ultimately be required, the single judge is obliged to perform the same tasks he bears in any case of deciding threshold questions which must be resolved prior to consideration of the merits of any claim. Exercise of this judicial function by the single judge not only properly limits the role of a three-

judge court to a consideration of merits, but may also obviate the necessity of convening such a court where a decision with respect to the merits is not appropriate. *Note, 77 Harv. L. Rev.* 299, 306–10 (1963). The fact that a three-judge court has been requested does not, then, render his duties merely ministerial or procedural. *McReynolds,* v. *Christenberry,* 233 F. Supp. 143 (S.D.N.Y.) *cert. denied,* 379 U.S. 972 (1965). It is his province to decide, for example, whether a substantial federal question has been presented, (*Mrizek* v. *Long,* 187 F. Supp. [1221] 830 (N.D. Ill. 1959)); whether a case or controversy exists, (*Lion Mfg. Corp.* v. *Kennedy,* 330 F. 2d 833 (D.C. Cir. 1964)); whether a claim for equitable relief has been stated, (*Pierre* v. *Jordan,* 333 F. 2d 951, *cert. denied,* 379 U.S. 974, *rehearing denied,* 380 U.S. 927 (1965)); or whether a justiciable question has been presented, (*Western Association of Lumbermen & Loggers* v. *Krug,* 79 F. Supp. 344 (D. Oregon 1948). In sum, the single judge must decide first, whether any decision on the merits of a claim is proper, and second, if that decision must be made by a three-judge panel.

The plaintiffs have prayed for a judgment declaring illegal the hearings held at Chicago in May, 1965 by the Committee. A declaratory judgment, like any other form of relief, can be granted by a district court only in a suit involving an actual case or controversy, for Article 3 of the Constitution of the United States has placed that limitation on the federal judicial power. *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 461 (1945).

Simply stated, the objective of the plaintiffs is to interdict any future prosecution resulting from their refusal to give testimony before the Committee. This relief is sought on the theory that the requested

declaration would establish that the plaintiffs were warranted in their refusals to testify by illegal Committee practices, thereby eliminating the spectre of prosecution by creating an absolute defense to any such proceedings. A declaratory judgment is an interdicting remedy. It can terminate [1222] controversies before they reach a crisis stage by providing a judicial determination of the state of the legal relations between those who are parties to the controversy. It is important to note that this terminating effect of declaratory judgments depends upon the doctrine of *res judicata.* The issues resolved in a judgment declaring legal relations are effectively and finally settled only because, under *res judicata,* any party to that suit may raise the judgment in bar of any future attempt by another party to the suit to revive the same questions in a judicial proceeding. It becomes clear, then, that for a declaratory judgment to serve its function of terminating controversies, all the parties to the controversy must be parties to the suit for the declaration. Parties to the controversy not joined in the suit would not be bound by the judgment under *res judicata,* and could force adversaries who had participated in the suit to relitigate the same issues in a subsequent action. The judicial effort expended in granting the declaratory relief would have been a fruitless exercise, for the controversy would have remained vital. And the cases are uniform in holding that declaratory judgments are not appropriately granted where they will not terminate the controversy involved. *Cha-Toine Hotel Apartments* v. *Shogren,* 204 F. 2d 256 (7th Cir. 1953; *Angell* v. *Schram,* 109 F. 2d 380 (6th Cir. 1940); *Velsicol Chemical Corp.* v. *Hooker Chemical Corp.,* 230 F. Supp. 998 (N.D. Ill. 1964).

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In the light of this explanation of the objective of [1223] the prayer for this relief and of certain aspects of the limitations of this remedy, the facts of this situation can be more comprehendingly examined for a case or controversy for which this declaratory judgment would be appropriate. There is absolutely no doubt that there exists between these parties differences of opinion on matters of serious moment to the plaintiffs, and the facts giving rise to these differences are concrete rather than abstract. The hearings have been conducted and the plaintiffs have declined to give testimony. This controversy between these plaintiffs and these defendants is not, however, the one relevant to the objective of the prayer for declaratory relief under discussion. As was stated, the plaintiffs seek to prohibit any future prosecution for their conduct before the Committee. It is now necessary to examine more carefully the source of the prosecution which they seek to prevent.

If their conduct was in fact improper, the plaintiffs could be punished directly by the House of Representatives for contempt of Congress, for the Constitution by implication leaves that power with the Congress. *Anderson* v. *Dunn,* 19 U.S. (6 Wheat.) 204 (1821); *Jurney* v. *Mac Cracken,* 294 U.S. 125 (1935). However, that involves a process so cumbersome that Congress has provided an alternative through the enactment of 2 U.S.C. §§ 192 and 194 (Supp. 1965). Section 192 makes an improper refusal to give testimony before a House Committee a federal [1224] crime, and the courts have referred to a violation of this statute as "contempt of Congress." *Yellin* v. *United States,* 374 U.S. 109 (1963). If the plaintiffs improperly refused to testify before the Committee, then, their conduct could be punished either by the Congress as contemptuous or by the United States as

criminal. It is beyond doubt, however, that the only procedure with which the plaintiffs are substantially menaced is a prosecution pursuant to sections 192 and 194. For example, the plaintiffs' supporting brief of February 23, 1966, at p. 20, cites an article in the Chicago Sun-Times of January 14, 1966, p. 15, relating the Committee's public announcement that it would seek to have these plaintiffs indicted for violating section 192. What the plaintiffs in fact apprehend is prosecution by the United States, and a declaratory judgment against these defendants could not establish a defense to any such proceedings. The government is not a party here and would not be bound under *res judicata* by the declaration here requested. If it came to pass, subsequent to an award of this relief, that criminal proceedings were instituted against these plaintiffs by the United States, another court would be obliged to again consider the merits of the defense the plaintiffs seek to establish here. The declaratory judgment sought here, then, could not, if granted, terminate the relevant controversy, which would exist, if at all, between these [1225] plaintiffs and the United States. The court has not said that there is no case or controversy between the parties to this action. Rather, assuming that such a controversy exists, it is not one for which the declaratory judgment requested is an appropriate remedy.

A further point must be made, lest it appear that this claim for relief has been dismissed merely for a defect of parties which could perhaps be remedied. As was explained, the controversy which the plaintiffs in fact wish to terminate is that which would exist between themselves and the United States in a prosecution for violation of § 192. That controversy, however, is hypothetical. It has not yet come into existence. In the usual situation, the United States is the potential

prosecutor of one who violates a federal law at the moment the offending act is committed. However, Congress has provided in § 194 a specific procedure by which the United States becomes the prosecutor of alleged violations of § 192, in this language:

> "Whenever a witness summoned as mentioned in section 192 * * * refuses to answer and question pertinent to the subject matter under inquiry before * * * any committee or subcommittee of either House of Congress, and the fact constituting such failure is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with * * * the Speaker of the House, it shall be the duty of * * * the Speaker * * * to certify * * * the statement of facts aforesaid under the seal of the * * * House * * * to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

The effect of § 194 is such that the United States may not appropriately initiate a prosecution of these plaintiffs for an alleged violation of § 192, and is therefore not a [1226] party to the controversy arising therefrom, until such time as the Speaker of the House might certify to the United States attorney a statement of the facts constituting the allegedly illegal conduct. See *Ex parte Frankfeld,* 32 F. Supp. 915 (D.D.C. 1940); *contra, United States* v. *Josephson,* 74 F. Supp. 958 (S.D.N.Y. 1947). This procedure surely reflects the intention of Congress to prevent prosecution by the United States of one whose conduct it could punish directly until such time as the Congress has chosen to dispense with punishment or has chosen to forego its privilege of direct punishment and to resort to the less burdensome and less controversial

procedure of prosecution of the alleged offender by the United States in a court of law.

There could be no case or controversy between these plaintiffs and the United States regarding their refusal to testify until such time as the Speaker of the House might make the described certification. This the Speaker has not done, or at any rate, that has not been pleaded, and there is no case or controversy pursuant to which the United States could be made a party to this claim for a declaratory judgment. Any declaration of the sort here requested would have no effect other than serving as an advisory opinion apprising the United States Attorney of the opinion of this court as to the propriety of the Committee procedures during the May, 1965 hearings, and it is not the office of a federal court to render advisory opinions. *Coffman* v. *Breeze Corporations, Inc.,* 323 U.S. 316 (1945).

[1227] Pursuant to the objective of interdicting any future prosecution for violation of § 192, the plaintiffs have prayed for a judgment declaring void the subpoenas served to compel their appearance before the Committee in Chicago. Again, although there may be a controversy between these parties regarding the validity of those subpoenas, it is not one for which a declaratory judgment would be an appropriate remedy. A judgment of the invalidity of those subpoenas would not, under the doctrine of *res judicata,* establish a defense to the envisioned prosecution of the plaintiffs by the United States. As has been demonstrated, the relevant controversy pursuant to which the validity of the challenged subpoenas could be raised as a justiciable issue would exist between these plaintiffs and the United States, if and when the United States became their potential prosecutor, and

that controversy is wholly hypothetical. The requested declaration could not terminate the controversy anticipated by the plaintiffs, and it cannot, therefore, be granted.

The complaint prays for a judgment declaring unconstitutional the enabling legislation of the Committee, enacted in the Legislative Reorganization Act, 60 Stat. 812, 828 (1946) and included as Rule 11 of the Rules of the House of Representatives, 1946 United States Code Congressional Service 788, 793. The plaintiffs further request an injunction restraining these defendants from executing or [1228] enforcing Rule 11. Although these are two quite different forms of relief, and although the appropriateness of each in a given situation may depend upon distinct factors, the touchstone of each in this case is the alleged constitutional infirmity of Rule 11.

The concept of standing has not heretofore needed discussion, but it is now necessary to examine the plaintiffs' standing in this suit to issue their challenges to the constitutionality of this legislation. The requirement of standing is, simply stated, one that a plaintiff be an appropriate party to raise a constitutional question. And what makes a party appropriate is that the challenged legislation or public action has had some impact upon him, or has focused upon him in some manner distinct from its effect on the public at large. As the Supreme Court has stated, in commenting on this restraint imposed upon the exercise of the federal judicial power:

> "The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in

common with people generally." *Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923).

Assuming that there is a controversy between these parties concerning the constitutionality of Rule 11, the dictates of *Mellon* make this question pertinent: In what relevant manner do the circumstances of these plaintiffs differ from those of any other members of the public [1229] at large who may hold views identical to those of the plaintiffs? The answer is that there is no cognizable distinction. Nothing in the complaint indicates, for example, that these defendants are about to exercise their authority under Rule 11 to further interrogate these plaintiffs. Rule 11 has no distinct focus upon these plaintiffs which would render them appropriate parties to raise these constitutional issues in this suit.

It is clear that the plaintiffs' apprehension of prosecution pursuant to sections 192 and 194 cannot alter this conclusion. It is not relevant to the controversy involved in the claims for relief under instant examination. It has been demonstrated not only that such prosecution is only hypothetically possible, but that the clearly relevant controversy pursuant to which these plaintiffs could raise their challenges would exist between themselves and the United States rather than these defendants. The plaintiffs cannot point to a hypothetical controversy which would exist if at all between themselves and a stranger to this suit as a basis for standing to raise the constitutional challenges involved in the instant claims for relief.

The plaintiffs argue (at p. 35 of their supporting brief of February 23, 1966) that "Rule 11 is so vague that it violates the federal constitution by deterring the free exercise of first amendment rights by citizens throughout the country." Even if this be a cogent

argument against [1230] the constitutionality of Rule 11, the deterrent effect upon citizens at large would not establish standing for any particular citizen to raise this challenge. In support of this argument, the plaintiffs have cited (at p. 35A of their brief of February 23, 1966) several cases which they also assert to "establish plaintiffs' standing to sue on behalf of others whose First Amendment rights are violated by Rule 11." That is an inaccurate interpretation of the cases cited. Although those cases are precedents establishing that a party having standing may argue that the first amendment renders legislation unconstitutional by pointing to its effect upon the public as a whole, the challenging parties in each case had standing to sue because of some way in which the statute attacked had an impact upon them distinct from that upon the general public. For example, *Baggett* v. *Bullitt,* 377 U.S. 360 (1964), involved a class action brought by university faculty members who were under compulsion to subscribe a loyalty oath prescribed by the challenged statute; and in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), the parties raising a constitutional question were under indictment for violation of the penal statute under attack. As indicated, the exception to the usual requirements of standing which did exist in the cases cited by the plaintiffs was that the plaintiffs therein were permitted to broaden the base of their arguments by attacking a statute as unconstitutional because of its effect upon others, rather than upon the plaintiff alone. This exception was made because of "the danger of tolerating, in the area of First [1231] Amendment freedoms, the existence of * * * [legislation] * * * susceptible of sweeping and improper application." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963). These were

not cases where persons not suffering from the evils of the particular statute in some distinct way were permitted to attack its constitutionality.

The plaintiffs in this action lack standing to raise a challenge to the validity of Rule 11 in this suit against these defendants. A lack of standing, of course, means that the instant claims are not justiciable, and must be dismissed for lack of jurisdiction of the subject matter.

The complaint prays for an injunction restraining the defendants from seeking to initiate "contempt proceedings" against them. As has been illustrated, any such proceedings which might be instituted against these plaintiffs would be brought by the United States and not by these defendants. The role which could be played by the defendants in this regard has been indicated in the discussion of the procedures prescribed in 2 U.S.C. § 194. Under § 194, that role would consist of reporting to the United States House of Representatives the fact of the plaintiffs' refusal to testify. The plaintiffs argue that they will suffer irreparable harm if the injunction does not issue. When it is understood, however, that the defendants would thereby be restrained from doing nothing more than formally reporting to the Congress the much-publicized fact of the plaintiffs' refusal to give testimony before the Committee, the argument is wholly unpersuasive. The making of the report would neither automatically nor definitely result in the initiation of a prosecution of the plain- [1232] tiffs, which is the "irreparable harm" in fact feared. It would not necessarily mean that a grand jury would be requested to return an indictment. None of this would even be possible until such time as the Speaker of the House might make cer-

tification to a United States attorney of the allegedly illegal conduct of the plaintiffs. Further, despite the inference of § 194 that the Speaker automatically makes his certification following a report by a House Committee of an alleged contempt, it is clear that he does not do so unless the House as a body has considered the matter and resolved that that step should be taken. (See the plaintiffs' brief of February 23, 1966, at p. 20, noting that "The Committee has announced publicly that in the near future it will offer a resolution to the House of Representatives that the plaintiffs be indicted for contempt of Congress under 2 U.S.C. § 192.") Certainly a court could not properly interfere in these deliberations of an independent branch of the government. Surely the very reason that the House as a whole would consider the Committee's report, presented pursuant to a resolution to proceed under §§ 192 and 194, would be that it desires to consider whether the facts in the report merit further action. If the House did not wish to filter Committee recommendations of this nature in this manner, § 194 would be given a more mechanical interpretation, and the Speaker would notify a United States attorney to institute proceedings upon receipt of Committee reports, [1233] without prior House deliberations. The very matters which the plaintiffs contend warranted their conduct are the sort which the House would consider and which might lead it to defeat any resolution by the Committee. It would be an unwise if not unconstitutional judicial incursion into the internal affairs of Congress for a court to usurp a decision-making function of the House of Representatives through the medium of the requested injunction restraining, in circumstances no more compelling than those set forth in this complaint, a report by one of its standing committees.

It may develop that the Committee will report the plaintiff's conduct to the House; the decision of the House may be unfavorable to the plaintiffs and the Speaker's certification may be made. However, the decision of this court does not mean that the plaintiffs would then have no alternative other than raising the issues here present only as defenses to any ensuing criminal proceeding. The possibility of actual proceedings would yet be remote, for a grand jury would first have to return an indictment. The plaintiffs would, then, have adequate opportunity to resort to any remedies made appropriate by the fact that criminal proceedings had become possible.

The claim pursuant to which this injunction is requested is not one upon which that relief can be granted, and it will be dismissed pursuant to the motion of the defendants.

[1234] Finally, the complaint prays for an order on the defendants to file an unedited transcript of the hearings held at Chicago on May 25–27, 1965. This issue has become moot, for pursuant to the plaintiff's own motion, a transcript of those hearings has been filed as an exhibit in this suit. The prayer for this relief, then, will be denied as moot.

The defendants have raised and argued other grounds for dismissing this action, including lack of jurisdiction over the persons of these defendants, improper venue, and lack of jurisdiction over the subject matter under any of the statutes cited by the plaintiffs. (See defendants' brief of March 21, 1966, at pp. 20–30.) Because the motion of the defendants to dismiss is to be allowed on other grounds, a detailed analysis of these arguments need not be made. Suffice it to say that the plaintiffs, in their brief of April 15, 1966, pp. 1–5, have adequately demonstrated

that jurisdiction over the subject matter of this action exists under 28 U.S.C. §§ 1331(a) and 1332(a)(1); that venue is proper here under 28 U.S.C. § 1391(e); and that service has been properly made pursuant to 28 U.S.C. § 1391(e) and Rule 4(d)(5) of the Federal Rules of Civil Procedure, and would have supported this action against the defendants in their official capacities. It is doubtful that the service effected would have supported proceedings against the defendants as individuals, but that question need not now be reached.

As was said at the outset, in cases such as these, the single district judge must determine, first, whether [1235] any decision on the merits of the complaint is appropriate, and second, if that decision must be made by a three-judge panel. The court having determined that a consideration of merits in this case would not now be appropriate, there is no ground for the convocation of a three-judge court, and the motion of the plaintiffs to initiate the procedures of 28 U.S.C. § 2284 must be denied.

A great portion of the briefs presented by the plaintiffs and the intervening plaintiff was devoted to argument regarding the merits of the federal questions raised in the complaint. Arguments were made by both sides concerning the issue of whether a substantial federal question was presented in this suit, and what the test of that "substantiality" should be. Again, the grounds of decision of this cause have made unnecessary an evaluation of the ultimate merits of these arguments.

Similarly, although the relevance of the suit prosecuted by these parties before this court in May, 1955 (docket number 65 C 800) has been argued in the briefs of the plaintiffs and the defendants, a compari-

son of the facts or the disposition of that earlier case with the instant one need not be made. The instant decision is based upon the facts as they now appear, and not upon the disposition of the earlier suit.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 683

HON. RICHARD H. ICHORD, et al.,

Petitioners,

vs.

JEREMIAH STAMLER, M.D., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents pray that the Petition for Writ of Certiorari be denied.

QUESTION PRESENTED

Whether the Court of Appeals was correct in holding that the claim against the Attorney General and the United States Attorney is not barred by the Speech or Debate Clause.

STATEMENT OF THE CASE

Petitioners' statement is in the main accurate, but incomplete.* The following pertinent facts are omitted:

* Petitioners' reference to an "amended complaint" is unclear, as no such pleading has been filed. (Petition, p. 7.)

(1) In 1967, after the Court of Appeals for the Seventh Circuit denied a petition for rehearing *en banc* of its reversal of Judge Hoffman's original order of dismissal, petitioners chose not to seek review in this Court. (2R. 4A.)*

(2) Before respondents were indicted in July, 1967, they sought to add the Attorney General and the United States Attorney for the Northern District of Illinois as defendants and to enjoin initiation of the prosecutions. (3R. 11-13.)

(3) Judge Julius J. Hoffman, the only then available member of the three-judge court, denied both the requested injunctive relief and leave to add the prosecutors as parties. (The latter ruling was subsequently overruled by the entire three-judge court after indictments had been returned.) (3R. 18-19, 21.)

(4) Within hours after Judge Hoffman's denial of a temporary restraining order against commencement of the prosecutions, petitioners secured return of the indictments from the grand jury although they had been notified that respondents were at that moment seeking to obtain further relief from this Court. (3R. 23-26.)

(5) The three-judge court granted respondents leave to supplement the complaint with allegations that the threatened prosecutions constituted harassment and intimidation of respondents in violation of First Amendment rights. (4R. 50.)

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* ..... R. ..... refers to the volume and item number of the record filed in this Court.

(6) Prior to filing answers in December, 1967, and January, 1968, petitioners presented a lengthy motion to dismiss the complaint. Petitioners did not rely upon the Speech or Debate Clause. The motion was unanimously denied by the three-judge court. (3R. 31; 4R. 52.)

(7) Petitioners' answers to the complaint did not refer to the Speech or Debate Clause. (4R. 56; 5R. 68.)

(8) The three-judge court denied respondents' discovery requests in substantial part. (5R. 85.)

Petitioners distort the opinion of the Court of Appeals as to which review is sought. (Petition, p. 11.) Respondents refer the Court to the opinion itself. (Appendix A to the Petition.)

REASONS FOR DENYING THE WRIT

Introduction

The holding of the Court of Appeals in reversing dismissal of the complaint as to the Attorney General and the United States Attorney for the Northern District of Illinois is in compliance with *Powell* v. *McCormack*, 395 U.S. 486 (1969), and *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967). In its present posture, this case tenders no issues which have not been resolved by this Court in its well-considered opinions in those cases.

The trial of this cause has been postponed for over four years. Two orders of dismissal in the District Court have been reversed by the Court of Appeals. After decision on the merits, review is likely to be sought in this Court. Petitioners in substance seek interlocutory review which can only serve further to delay respondents' efforts to reach the merits.

I.

RESPONDENTS' CASE IS REAL, IMMEDIATE, AND CONCRETE

Respondents' challenge to the Committee is hardly abstract. (See Petition, pp. 16-17, 19.) Respondents were indicted in July, 1967, after their emergency motion for injunctive relief against commencement of the prosecutions was denied. Petitioners have repeatedly pressed for a trial on these indictments. Witnesses who appeared before the Committee at subsequent hearings and refused

to testify on First Amendment grounds have not been criminally prosecuted.* (See *Krebs* v. *Ashbrook,* Civ. No. 2157-66 D.D.C., dismissed April 1, 1969; *Young* v. *Willis* Civ. Nos. 2441-68 and 2445-68 D.D.C., dismissed June 26, 1969.) Petitioners have singled out respondents for punishment, and yet have the temerity to assert that respondents' case is hypothetical.**

Following the indictments, Doctor Stamler was swiftly placed on inactive status as Director of the Division of Adult Health and Aging of the Chicago Board of Health and as Director of the Board's Heart Disease Control Program.***

Golden v. *Zwickler,* 394 U.S. 103 (1969), upon which petitioners rely, presents a sharp contrast. Zwickler's 1964 conviction for violating the challenged state statute

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*Respondents' complaint, as supplemented, alleges that the prosecutions of respondents were instituted to intimidate and harass respondents in violation of First Amendment rights.

**During a recent hearing on cigarette labeling and advertising before the Committee on Interstate and Foreign Commerce of the House of Representatives, Petitioner Albert Watson, Representative from South Carolina, inquired of a witness who had cited Dr. Stamler's research linking cigarette use and heart disease, as follows:

> "Mr. Watson: Not for the purpose of discrediting Dr. Stamler, but is he the same Dr. Stamler who is under indictment now for contempt of Congress, the gentleman from Chicago?" (Hearings Before the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., ser. 91-11, pt. 2 at 526 (1969).

***See Second Supplement to Complaint for other allegations of direct, immediate, and continuing harm to respondents because of the indictments. (3R. 34.)

had been reversed before his complaint was filed, and no such prosecution had been initiated or threatened for his subsequent activities. This case more than meets the requirement of the Court in *Golden* v. *Zwickler* that the constitutional question "must be presented in the context of a specific live grievance." 394 U.S. at 110.

II.

THE ISSUES SUGGESTED BY PETITIONERS ARE EITHER HYPOTHETICAL OR RESOLVED BY PRIOR RULINGS OF THIS COURT

While baselessly castigating respondents for presenting "abstract" issues, petitioners tender questions to this Court based solely upon their "assumptions" about the future course of this case after remand. (Petition, pp. 11-12, fn. 7.) Whether respondents *might* amend their complaint, whether developments *might* make additional parties necessary, as permitted by the Court of Appeals, to "accord complete relief," whether declaratory or injunctive relief *might* be sought against the reconstituted Committee, are matters that must await proceedings on remand.

Golden v. *Zwickler*, 394 U.S. 103 (1969), reaffirmed the salutory principle that this Court should avoid constitutional questions not tendered by the record in a case before it.* It is petitioners who urge rejection of those strictures. They urge this Court to review issues which are not now present and which are likely never to arise.

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* See also the dissenting opinion in *Jenkins* v. *McKeithen*, 395 U.S. 411, 433 (1969).

When the Court of Appeals originally reversed Judge Hoffman's order dismissing the complaint (371 F.2d 413), petitioners did not seek review in this Court. Petitioners do not appear to deny the validity of respondents' complaint against the Committee prior to the amendment of Rule XI earlier this year. They now argue, however, that the Committee's *post litem motem* efforts to refurbish its image deprives the court of jurisdiction. Surely, parties having justiciable claims against First Amendment violations do not lose standing simply because the offending agency presents a moving target.

In any event, the legal consequences of changes in the Committee's charter are not now before this Court.

The issue tendered in the present posture of this case is not of general significance. The only question now before this Court is whether the Court of Appeals properly interpreted the rulings of this Court in *Powell* v. *McCormack*, 395 U.S. 486 (1969), and *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967). This Court held in those cases that employees of the Congress cannot take shelter behind the Speech or Debate Clause. It must follow that the Clause does not shelter officers of the executive branch, who generally are subject to injunctive suits against enforcement of unconstitutional statutes, including criminal statutes. There can be little doubt that the District Court erred in dismissing the prosecutor-petitioners as "ancillary." No new or significant issue is tendered by petitioners at this time.

CONCLUSION

Respondents respectfully pray that the Petition for a Writ of Certiorari be denied, but if this Court grants the instant petition, respondents respectfully suggest that it should decide the case on its merits and rule whether or not Rule XI of the House of Representatives upon which respondents' subpoenaes were based violates the Constitution.

Respectfully submitted,

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